American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; due for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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CURRENT OUTLOOK

American
Bar Association
Journal
★
October 1952

• How can lawyers always know the law?

Changes in the law invariably become available and ascertainable to lawyers after considerable lapse of time. Often there is a prolonged delay. Meanwhile, the busy lawyer must advise his clients and conduct his litigation and proceedings on the basis of the last information at hand, however erroneous. For example, some session laws are published months after a legislature adjourns. Dissatisfaction of the profession and the public with too long delayed availability of this kind of information is proverbial and the cost to lawyers and litigants in worry, work and lost causes cannot be estimated.

Some of the reasons for such delays, but not all, are presently inescapable. Publishers of decisions, of daily law bulletins and of such loose-leaf services as those relating to taxes and to some regulations have done much to shorten the time lost to printing, labor and the requisites of accuracy. Yet, the lag in the publication and dissemination of pending or new legislation and of information as to the issues in appeals as they reach appellate courts may be partly avoidable in many states.

For example, some bar associations, such as the Illinois State Bar Association, have long worked closely and successfully with publishers. Over and above their achievements in helping publishers hurry legal information along, that Association has been mailing frequent, regular digests of bills introduced and their status to members as part of their program of introducing legislation for the public good and of resisting bad bills. Yet, Illinois decisions are still not published until the thirty days after announcement have barred petitions for rehearing. Others, such as The West Virginia State Bar, through the strong legislative program of its Public Affairs Committee comprising former legislators, follow all legislation, including bar bills. Only legisation in special fields can escape them. That Association is also working on a method of digesting and disseminating the issues in cases reaching their appellate court. The Ohio State Bar Association publishes supreme and appellate court decisions in its weekly bar journal. Significant *nisi prius* decisions are digested in Columbus and Akron (Ohio) bar bulletins. The State Bar of South Dakota has been trying to make new legislation available earlier.

Recognition is dawning that surveillance over and even performance of these essential services to lawyers are in the realm of a bar association's responsibilities. It is just as vital to bar associations as it is to their members that the lawyers receive information on new law promptly and at a fair price.

• Do fee schedules violate antitrust laws?

Since mention was made of minimum fee schedules last month, a further *caveat* may be in order. Apparently, the only relevant decision is *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 94 L. Ed. 1007, 70 S. Ct. 711.

The dissent of Mr. Justice Jackson indicates that minimum fee schedules should never constitute agreements among lawyers, but may properly represent the result of studies and statistics as to what are found to be the average minimum or median fees for services in the particular area. Annual studies and analyses of average law office operation costs appear to be equally outside the antitrust laws.

The above citation and references are by courtesy of Shepard's Citations, Inc., whose gift, in the public interest, by W. G. Packard, its President, of Shepard's Citations for the United States Supreme Court Reports previously given by West Publishing Company to the Association's library has been accepted and appreciated by our Board of Governors.

• Another permanent conference of local bars

The permanent organization of the Conference of Local Bar Association Officers at the annual meeting of The West Virginia State Bar at Huntington August 22 provided for adoption of a constitution and by-laws patterned on those adopted by the similar Conference in New York of which we have distributed reprints. A program for the local bars was developed for the year, including support of their State Bar's legislative and other plans. West Virginia thus follows the trail blazed in Ohio, New York, California, Illinois, Michigan, Pennsylvania, Iowa, Louisiana, Texas and others whereof we yet know not.

• Bar activities—a catalogue

Because of the interest manifested by the associations in various bar programs and activities of their sister associations of which the Amercian Bar Association is building an index and history, the list of such forums, working groups and fields of endeavor in our records is given here in the hope that their mention may be provocative and that additional activities will be called to our attention:

Work and plans, usually under *state bar* leadership, exist on: American Citizenship Committees; Conferences of Local Bar Officers; Disciplinary and Grievance Procedure Reform; District Federations of Local Bar Associations; District Meetings; State Bar House of Delegates; Integration of State Bars; Lawyer Referral Service Committees; Legal Aid Committees; Local Bar Associations Committees (uniform election date, model constitutions, uniform organization, speaker's bureau for bar programs, legislative programs, local bar handbook); Local Bar Organizations Committees; Placement, survey of lawyer density; Public Relations Committees; State Bar Executive; Title Insurance by Bar.

Work and plans are in progress in *state or local bars or both* on: Admiralty and Maritime Law; Admissions to Membership; Adoption of Long Range Objectives; Aeronautical Law; Agreements with Medical Societies on Expert Witnesses; American Citizenship (local bar committees, adult education, Citizenship or Constitution Day observances, naturalization proceedings, new voters' education and student education); Administrative Law; American Law Institute; Antitrust Law; Arbitration Committees; Art Exhibits by Members; Association Administration; Association Finance; Association Indemnification of Clients' Losses to Lawyers; Award of Merit of the American Bar Association; Awards for High School Students; Bar Anniversary Celebrations; Bar Examination Improvement; Bar Organization Charts; Bulletins and Journals (weekly, semimonthly and monthly); Character and Fitness of Applicants; Check Lists for Clients' Interviews; Civil or Bill of Rights; Civil Service; Clerkships for Attorneys; Commercial Law; Committee Liaison with Vice Presidents or Board Members; Communications Law; Constitutional Convention; Constitutional Revision; Continuing Legal Education; Conventions and Meetings; Corporation, Banking or Business Law; Courthouse Tours (for high school students, for new attorneys); Criminal Law; Customs Law; Decision Reporting by Associations; Defense of Accused Indigents; Defense of Mistakenly Convicted Persons; Drainage Law; Dues of Associations (comparisons); Duties Manuals (for officers, board members or chairmen); Economic Condition of the Bar; Employment Surveys; Essay Contests (for high school students, for law students, for lawyers); Estate Representatives Instructions; Family Law; Federal Judiciary; Fifty-year Lawyers Honored; Films and Wire and Tape Recordings; Forms Standardized for Law Offices; Foundations for Associations—tax exempt (for bar buildings, indigent lawyers or programs); Glee Clubs; Gridiron Shows and Revues; Grievance Committees; History of Bench and Bar; Hotel Reservation Service for Members; Hours of Nearby Offices and Courthouses; Institutes (atomic energy legal problems, arbitration in practice, domestic relations, child care,

(Continued on page 810)

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from Association members any manuscript, material or suggestions of items for consideration for publication. With our limited space we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be published; exceptions are sometimes made as to solicited contributions. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

Manuscript must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet this requirement.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done. Because of the small size of the JOURNAL staff, unsolicited manuscripts cannot always be immediately acknowledged, although every effort will be made to do so. A period of four or more weeks is usually required for consideration of material; some manuscripts may require more time for consideration because of the nature of their subject matter.

(Continued from page 808)

demonstrations and "how" skits, federal tort claims, law handbooks, law office management, legal secretaries' training; libel and censorship, medical jurisprudence, medicolegal problems, miscellaneous, police law, practice mechanics for young lawyers, pretrial, probate, tax, title examinations, traffic court, trial tactics); Insurance Law; Insurance (lawyers' group, lawyers' protective liability-malpractice); International Law or Comparative Law; Interorganizational Relations; Interprofessional Relations, Investigative Facilities for Disciplinary Work; Judicial Administration (integration of judiciary—by administrative office of courts—by judicial conference—by judicial councils, delegation of rule-making power, improvement of jury system, simplification of law of evidence, improvement of administrative tribunals, improving methods of judicial selection, metropolitan court organization, traffic and justice of the peace court improvements, adequate judges' salaries, congested dockets, cooperation with laymen, demonstrative evidence equipment for courtroom, excessive judicial vacations, grand jurors' handbook, improvement in judicial selection by bar polls or plebiscites, jurors' handbook, jury instructions standardized); Junior Bar Association or Young Lawyers; Jurisprudence and Law Reform; Juvenile Law; Labor Relations Law; Law Office Management; Law Students' Bar Participation; Law Libraries for the Bar; Lawyer Referral Service; Lawyers' Fund (credit union); Legal Aid Bureau; Legal Education and Admissions to the Bar; Legal Service to the Armed Forces; Legislative Programs; Legislative Digests for Members Regularly; Legislative Investigation Service for Members; Local Bar Executive; Loyalty Oaths; Medical Jurisprudence Law; Membership Folder; Mentally Ill, Lunacy and Incompetency Law; Military Justice; Mineral Law; Minimum Fee Schedules; Mock Trials (for high schools or other organizations); Moot Court for Law Students; Municipal Law; Necrology or Deceased Lawyers' Resolutions; Neighborhood Law Offices; New Members; Notaries Public (commissions, examination for and approval of, assignment of fees of lawyers to bar association); Patent, Trade-Mark and Copyright Law; Patron and Sustaining Memberships; Placement of New Lawyers; Practice and Procedure, Civil; Prisoners' Admonition of Rights Placards; Probate Law; Professional Ethics; Public Relations (local bar committees, contests and awards, directors or counsel, institutional advertising, motion pictures, newspaper series, pamphlets, press conferences, press-lawyer ethical code, radio-lawyer ethical code, radio programs, releases, scripts, speakers' bureaus, television programs); Public Utilities Law; Publications Committees; Real Property Law; Regulation of the Professions (socialization); Scope and Correlation of Work; Stenographic Employment Service; Study of Court System; Supreme Court Cases Pending Check Service; Taxation (federal law, local law); Trust Law; Title Standards; Traffic Court Committees; Unauthorized Practice of the Law (agreements between bars and banks or trust companies, agreements between bars and collection agencies, agreements between bars and life insurance companies, agreements between bars and life underwriters, agreements between bars and realty boards, prosecutions); Young Attorneys' Orientation.

We are anxious to make our index a complete one for your future use. If we have omitted things your association is doing, please let us know. If you are interested in any activity mentioned here, we shall, so far as we can, explain its nature, purpose and technique and refer you to any associations that have done work in that field. The interchange of such information will profit the entire profession.

Edward B. Love
Director of Activities
Editor-in-Charge

"Twelve Good Men and True": The Forgotten Men of the Courtroom

by **Rubey M. Hulen** · Judge of the United States District Court for the Eastern District of Missouri

■ Trial by jury is one of the most sacred features of Anglo-American law; the founding fathers considered it so fundamental to liberty that they included it among the list of fundamental freedoms guaranteed by the Bill of Rights, and most state constitutions have similar guarantees. American lawyers often point to the lack of jury trial in the Soviet Union as one of the great differences between American and Russian standards of justice. In this article, Judge Hulen declares that, in spite of the respect with which we treat the institution itself, almost nothing has been done to help the men who are indispensable to the institution: the jurymen, who are often called upon to make life-or-death decisions upon the most complicated evidence, with no experience, no training and no help save instructions from the bench, the meaning of which even learned members of appellate courts often dispute. Judge Hulen declares that it is time the Bench and Bar paid some close attention to the problem.

■ The awe felt by the trial lawyer in experiencing his first jury trial never leaves him. He gets a thrill from every jury trial, whether held in an unpretentious county courthouse or in a mahogany-paneled courtroom. He cannot tell you why, but the fascination of the jury trial stays with the able trial lawyer for life. A trial before a judge is different. The atmosphere is different. All concerned are trained in the law. It is their life's work. There is reverence by the trial lawyer and many judges toward a jury trial. It must flow from the presence in the jury box of twelve citizens, as close to the actual operation of their government as man can get. By the norm of their individual experiences in life, the jury strives earnestly to determine wherein the truth lies in the dispute submitted to them—not because the work is their vocation, but out of a conviction that jury duty must be performed if this government by the people is to survive.

The oath taken by a juror is an awesome thing. Compare it with the oath taken by a judge. Precisely, we require the layman, before his God, to pledge "a true verdict [to] render". No more nor less. That some verdicts miss the narrow line of "true" is not entirely the fault of the jurors. The judge or lawyers usually have failed somewhere in the submission. Rarely are there cases of dishonest jurors, and one searches in vain for a record of a corrupt jury. The incidence of bad faith or lack of conscious effort among jurors is so rare as to constitute the prime virtue and basic logic of the jury system. We need look no further for the reason why the system finds such a firm place in the convictions of the people and their refusal to yield to the plea of the cynics of the Bench and Bar who urge that the jury system be abolished.

Grave consequences flow from jury verdicts. This is a well-known fact; yet when examination is made of the thin file representing the extent of consideration which the organized Bar has given to improvement in the administration of justice by jury trials, a brief reminder seems called for. The verdict of a jury may take the life of a man. On vital issues of fact, which encompass the most sacred values, almost invariably man turns to his fellow men to be judged rather than to a judge learned in the law. In hundreds of courtrooms in this country, people daily are placing their lives and liberties, and all that makes life worth while, in the hands of juries. If the layman did not trust juries to be fair and honest, jury trials long ago would have ceased to exist as a part of our judicial system.

Turn to the civil side of the court and we find the verdicts of juries on matters not equally as serious as those on the criminal side, yet their findings are always on questions of great importance to the parties concerned. Here conflicts are submitted to juries ranging from the more simple to the complicated, such as trial of an antitrust case. A judge may take months of study to reach a decision in this latter type of litigation. A jury will be expected to reach a verdict in a matter of hours, after an extended trial. The ruling which a judge makes is subject to review by a higher court. The finding of a jury, based on substantial evidence, is sacred and binding on the highest court in the land. If judges do not regard decisions by juries, in the force of their impact on those con-

cerned, as equal to the decree of a judge, the parties to the litigation can get little consolation from their attitude. Many lawyers still fail to take notice of the regularity with which appellate court decisions end: "There being substantial evidence to support the verdict of the jury, we will not disturb it."

Juries Have Little Opportunity To Express Themselves

Juries have little or no opportunity to express themselves and to be heard by the Bar and Bench on the difficulties of their work. Had they been provided the means to present the case of the handicaps placed on them by the Bench and by the Bar, and to present their recommendations of ways in which the jury system could be improved, there is reason to believe that improvement in the jury system would have advanced along with other phases of the administration of justice. But there are occasions when there comes a faint rumble from the jury room, and it may reach those in authority. Judge Cook, of the Circuit Court of Missouri, has had the experience. Here are some of the things jurors told him about instructions:[1]

> "They were the longest sentences I have ever seen"—"If you want the jury to understand the instructions, what you really need is twelve Philadelphia lawyers on the jury"—"Surely you didn't expect us to understand those things?"—"Judge, are you kidding?"—"I am just a farmer with a high school education. I read one instruction and thought the plaintiff should win; I read another instruction and thought the defendant should win; I just couldn't figure them out"—"Judge, it's the first time I ever saw Greek written in English"—and here is the prize: "You see, Judge, it's like this—we all talked about the instructions a long time and didn't seem to be getting anywhere. John Doe had gone off to college for a couple of years, so we asked him to read them and see what they meant. He went over in the corner while the rest of us talked about the case. We got in a terrible argument about the defendant carrying insurance; some of us thought he had insurance, some others said there wasn't any evidence about insurance and that that lawyer was just trying to trick us by asking us those questions about the insurance company. I knew . . . wouldn't ask us about insurance if he didn't have insurance. Finally Doe came back over and said if he had more time maybe he could figure them out, but there were just too many 'if so's' in there for him. So the instructions didn't help us. We were about evenly divided on the insurance. But we didn't have any trouble deciding who caused the accident and how much the plaintiff should get."

And this conscientious trial judge is forced to conclude:

> Still, after half a century, we find ourselves in the embarrassing position in regard to instructions to the jury in plain, ordinary automobile accident cases in which the lawyers do not know how to write the instructions, the trial judges do not know whether or not they are correct, and only God understands them.

In a recent examination of the result of one hundred appeals from judgments based on jury verdicts in Missouri state courts, it was found that 50 per cent of the cases were reversed for new trials and over half the reversals were because of error in instructions. And so Judge Cook writes:

> After nearly fifty years of automobile accident cases we still cannot write the instructions with any degree of certainty that they will pass muster in the appellate courts.

Missouri is not alone in its predicament, but perhaps more frank than some other states in acknowledging the plight of the trial judge in instructing juries. Judge Cook sounds a warning:

> Today there are many people in Missouri with meritorious causes of action who will not turn them over to lawyers because of their lack of confidence in our court system. . . . There are many others who settle their honest claims for trifling sums because of this same lack of faith in our courts and a desire to relieve themselves of the emotional strain of court proceedings. This is not a healthy condition for the Bench and the Bar.

And a plea to the Bar before it is too late:[2]

> The bar association and the judiciary should study this problem with a view in mind of simplifying and standardizing instructions in automobile accident cases. The present time is none too soon for such a study and possible solution. May we not end this century with the same confusion that now causes us to say, "We should be ashamed of ourselves."

For the same period for which the study of state appealed cases for Missouri was made, a comparison was made of the result of one hundred cases tried by juries in the federal court of that state and appealed. Two reversals were found—neither because of errors in instructions. One difference in procedure in instructing juries in federal courts from the procedure in most state courts is that federal trial judges may submit the issues to a jury in simple terms devoid of technical niceties. The necessity of counsel's making objections to the charge before the jury retires is responsible for leaving many jury verdicts undisturbed. The result is termination of litigation and, in most circuits, a docket that is current. Notwithstanding this comparison, and only a few months after publication of the statement of the state judge that the instructions to juries in at least one state had degenerated into legalistic conundrums, the Judiciary Committee of the House reported, favoring unanimously, without a hearing, a bill that would force all federal courts to follow the state practice in instructing juries in all jury cases. That such a drastic change in federal procedure should be reported by committee without protest from the Bar not only is a sad commentary on the interest of the Bar in the improvement of jury trial practices in the administration of justice, but also is illustrative of the treatment the subject has received by the Bar. The burden of much of the thought given to jury trials by the profession is in support of their elimination or restriction in our judicial system. All fair and open minds should be convinced by now that trial by jury is here to stay. Now it is urgent that the Bar give the subject continuous, serious, affirmative and intelligent thought. The growing complexity of litigation calls for

1. *The Missouri Bar*, August, 1951.

2. A joint committee of the Missouri Judicial Conference and the Missouri Bar on Standardization of Instructions has been appointed. This committee is the result of a growing series of serious complaints among members of the Missouri Bar, of which Judge Cook's is typical.

such action from the Bar as never before.

Charge to the Jury Should Be in Simple Language

Modes of instructing juries, time for exceptions to the charge, and reduction of the charge to simple and lay language must be placed at the head of the subject of improvement in the jury system. In making the comparison of results on appeal, between state cases and federal cases, it was not my purpose to imply the federal system cannot be improved. A good case can be made for the requirement that immediately on completion of the charge, in federal court, the reporter transcribe it, so that a copy may be given to the jury. Next, and of no less importance, is the necessity of giving to the jury, in some form, information on the nature of jury duty and the circumstances surrounding its performance.

On most juries there will be some members who have never before been in a courtroom. These jurors enter on the trial of important and complicated cases with their oath the sole instruction given to them on the subject of their duties. Common terms such as "plaintiff", "counterclaim", "cause of action"—to mention only a few—are new and not understood. How long will the Bench and Bar, generally, consider with suspicion any action toward reducing the ignorance of the juror on court proceedings?

Individual judges, the Conference of Senior Circuit Judges of the Federal Courts, and a few state Bars have given thought to this aspect of jury service. The jury instruction book has resulted. Nowhere does it have authority of rule or law. Feebly, hesitatingly, lest it go too far in reducing the layman's ignorance of trial procedure, handbooks are being used by some judges to tell jurors something about their work, its importance, how it should be approached and performed, along with the fundamentals of court terms and procedure. But many judges frown on the practice in its simplest form. Many refrain from fear of criticism of a higher court.

Jury Handbooks Are Commendable Efforts

All the jury handbooks represent commendable efforts. But a timidity is recognized in all of them. The hesitancy with which the Bar habitually treads upon new ground is the reason, no doubt. Judges who are responsible for this comparatively new procedure are feeling their way.

With no pride of authorship the writer has recently completed another juror handbook. All works available on the subject were examined and freely copied from, but this book goes farther in detail and subject than any book of instruction that has come to my attention. I was privileged to have the aid of Judge John C. Knox, of New York, Judge Paul J. McCormick, of California, and Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court. These able jurists with long and distinguished careers gave valuable suggestions.

Its manner of use is to send it to the juror along with or soon after the notification for jury service. It reduces requests to be excused from jury service to a minimum. It gives the juror a chance to learn something about the nature of the service before him prior to his going to the courtroom. Examination of the pamphlet by the Bar is welcomed; thus lawyers may easily learn everything said to the prospective juror. Thus far no lawyer has taken an exception to its use.

One innovation is an effort at the outset to impress the juror with the honor of jury service and the importance of the work before him. The juror is told he is an officer of the court, that he has a right to expect respect and courtesy from all court officers including the judge. Jurors should be accorded courteous and considerate treatment. When jurors are treated as officers of the court, when they are told they are not advocates of either side, have no personal interest in the case, but sit in the jury box as judges to judge facts, just as the judge is there as the judge of the law, and when jurors are accorded the respect due them,

Rubey M. Hulen has been a federal district judge since 1943. A graduate of the Kansas City School of Law, he began practice in Columbia, Missouri, after serving in World War I, and, except for the period 1920-1924 when he was the County Prosecuting Attorney, he engaged in active practice until he was appointed to the Bench. He is a member of the faculty of the Law School of Washington University in St. Louis, lecturing on federal jurisdiction and procedure. He has been a member of the Association since 1922.

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it is the exceptional man or woman who will not respond by giving his best efforts to perform his or her duties fairly, honestly and impartially. During my practice I have seen more than one jury working in a sullen atmosphere because of treatment they have been accorded by a judge.

Jurymen Should Be Told That Their Service Is Important

The service of one juror is important. This is brought to the attention of the individual as the summons is delivered—even as the juror may be considering whether the court can get along without him:

> The vitality and endurance of our democratic institutions can find ultimate safeguard only in the hearts, minds and wills of the citizen. The strength of democracy does not depend on the law but in the collective and common effort of a free and independent people, acting individually when and where opportunity permits, to dis-

charge the obligation of citizenship. If our work is earnest, honest, intelligent, and patriotic, intended to preserve and promote the basic principles of our form of government, even when self-sacrifice is called for, democracy will not fail. One citizen's default casts a burden on the neighbor and lends support to those forces which seek destruction of our democratic processes.

Near the end of the nine-page pamphlet the subject is again touched on:

If you have some physical disability which in your judgment would prevent your efficient performance of jury duty, or if your circumstances are such that in candor and good faith you believe jury service would cause you a hardship to an extent that is improper for your Government to call on you for this service, and you feel that in all fairness another citizen should be required to serve in your stead, then under those conditions you should get in touch, by mail or personally, with me, prior to the day on which you have been notified to appear for jury service, and your request for relief will be given due consideration.

Under the heading "Things a Juror Should Know" an explanation is given of the two kinds of cases—criminal and civil; jury selection proceedings; duties of the jury as distinguished from those of the judge; conduct of the juror during the trial; meaning of the more commonly used terms the juror will hear during the trial; and conduct of the jury in the jury room after the case is submitted.

Under the heading, "Selection of a Jury", the jury is told:

Ordinarily 18 jurors are required to be qualified (exception: criminal case involving a felony) and when qualified constitute the jury panel for the case they are qualified on.

Before the panel of 18 jurors is qualified they are examined and asked questions to determine their qualifications as jurors in the particular case. Every juror should be careful to pay strict attention to these questions and to answer frankly. No juror should consider the purpose of these questions is to pry into his personal affairs, but it is necessary that some personal questions be asked. Should it be ascertained that any prospective juror is not qualified for the particular case he is excused and another of the jurors present in court takes his place.

Any person excused from jury service during the qualification process, or by having his name stricken by the lawyers for the parties, should not consider the challenge or retirement from the jury panel as any reflection on his integrity or intelligence. None was intended by the judge or lawyers.

When we consider the new and strange proceeding a juror finds himself a part of for the first time, what must be his reaction to some of the questions asked of him concerning his qualifications, and upon being told to step aside after the challenges are made? If this procedure is explained it means less confusion in the juror's mind. It means greater understanding of our court system and how courts function.

How often are jurors puzzled by the whispered conferences at the bench? What is the reaction as jurors may ponder who is at fault? Why not tell them what is going on and relieve their curiosity?

There are occasions during a trial when the judge may call the lawyers to the bench, or the lawyers may approach the bench, and there engage in conversation with the judge out of the hearing of the jury. At such times law matters or procedural matters are being discussed and this manner of doing it is to save the inconvenience of sending the jury from the court room. Inasmuch as a jury passes only on factual matters it is felt to be the best policy to discuss law matters and procedural matters out of their hearing in order to avoid any chance of confusion to the jury. This practice should give you no concern and you should not even attempt to draw any conclusions as to what is being said out of your hearing.

Do trial lawyers refrain from making an objection lest it create an unfavorable impression on the jury? Why not try to remove this hazard from a jury trial?

From time to time during a trial the lawyers may make objections to a question asked, or an exhibit offered, by the other side. A lawyer is perfectly within his rights in making objections to the evidence and exhibits which he believes are not proper in the case. If the judge believes the evidence objected to is not proper, the objection will be sustained. If he thinks the lawyer is mistaken in his objection he will overrule the objection. In any event the matter to be decided is wholly a legal question. Objections by the lawyers, or the ruling of the judge with regard to them, should not cause the jury to draw inferences of any character for or against either side. It may happen in a particular case that a lawyer will make objections which you believe should not have been made. Never let any such action by a lawyer influence you in a case in any way. A trial is not a contest of learning, skill or tact between lawyers, but a proceeding to find out the truth according to the evidence received and the law as explained by the judge.

Rarely do juries have any guide for this work after a case has been submitted and they retire to the jury room to consider their verdict. It is a tribute to their sound common sense that only rarely do they deviate from orderly procedure. It should serve a useful purpose to give them some suggestions—and they can be only suggestions:

Your first duty upon retiring at the close of the case is to select your foreman. The foreman acts as chairman. It is his duty to see that discussion is carried on in sensible and orderly fashion, to see that the issues submitted for your decision are fully and fairly discussed, that every juror has a chance to say what he thinks upon every question. Where ballots should be taken, he will see that it is done. He will sign any written verdicts that are required, and any written requests made of the judge. In selecting your foreman, it is well to select someone of experience and general knowledge, if possible, for a good foreman keeps the discussion in due bounds, much time is saved and better results secured.

Quite often differences of opinion arise between jurors. When that happens each juror should say what he thinks and why he thinks it. By reasoning the matter out, it generally is possible for jurors to agree. A juror should not hesitate to change his mind if he decides that his first opinion was not right, but one who has an opinion on a question should not change it unless his reason and judgment is changed. It is wrong for one juror to try to bully another into changing his mind. It is just as wrong for a juror to refuse to listen to the arguments and opinions of others—in other words, to be bull-headed and stubborn. When one has listened to all the opinions of others, and considered the reasons for their opinions, and has reasoned the matter out and formed his own judgment, he should, of course, stick to it unless he is persuaded to change his

(Continued on page 835)

Are We Neglecting Constitutional Liberty?

A Call to Leadership

by **William T. Gossett** · Vice President and General Counsel of the Ford Motor Company

▪ "The American Bar has played little or no part in the struggle against the degradation of the investigative process. . . .At a recent convention of the American Bar Association there were over seventy panels and none of them dealt with the vital issue of constitutional liberty—as much an indictment of self-complacency as of the curse of professional specalization." With these unflattering words of the editor of the *Washington Post* as his text, Mr. Gossett considers the problem of reviving the leadership of the American lawyer—a leadership which he believes has been in part dissipated and lost. He finds the one area that calls loudest for professional attention is the investigative process of the Congress and the state legislatures.

▪ We in America today are hearing a call to leadership. We stand on the vast stage of history before the eyes of the world. The curtain has gone up. There is a clamoring from the gallery. There are cheers, and some catcalls. There is a claque, and there are hecklers; indeed, some of the world's most experienced hecklers.

At a time like this we need especially to remember what has always mattered most to us. It is at such times that we are justified in asking ourselves: What is the promise of America's greatness? What is the basis of our faith? What is our role and duty? What should be our contribution to the world to come?

We have impressed the peoples of the world with our industrial "know-how", with our genius for mass production, with our capacity for achieving material wealth. But if we rely solely upon those attributes, we shall be unsuccessful in the current contest with our evil and crafty foes. And so we must meet them on the battlefield of ideas—in the realm of the human spirit.

In this country we are committed to the proposition that the human being is the central, the most precious resource of our society. We insist that there is a divine spark in every human being that sets him apart, not only from all other animals, but from every other human being; and that he thus has an integrity of person which it is both unwise and dangerous to violate. It has been our purpose, therefore, to secure to the human individual the greatest possible freedom, consistent with the welfare of the group of which he is a part.

But as our society has become more complex, as people have become increasingly interdependent upon each other for their welfare, it grows more and more difficult to secure a full measure of freedom to the individual without risk of adverse effects upon the group. Thus, we are constantly occupied with the process of balancing the relationships between government and men. Indeed, it has been said that this continuing conflict between the policies of men and of governments has become one of the authentic hallmarks of our time.[1]

Then, too, this process of adjustment often is complicated by waves of mass jitters and emotionalism that periodically sweep over the populace. Times of great internal stress and external danger seem inevitably to produce drastic measures and countermeasures some of which involve the risk of weakening the foundations of our society.

I could cite many examples. Some of the more prominent ones are the Palmer raids during World War I; the refusal to seat six duly elected socialist legislators in the State of New York in 1920; the erection of the current Loyalty Boards; and the tactics and procedures employed by various congressional investigating committees.

As to the last of these—the tactics of congressional committees—recently, I came across these remarks in an article by Herbert Elliston, the distinguished editor of the *Washington Post*:[2]

> The American Bar has played little or no part in the struggle against the degradation of the investigative process—a degradation that has made it almost the equivalent of the lettre de cachet in pre-Revolutionary France. At a recent convention of the American Bar Association there were over seventy panels and none of them dealt

1. John Lord O'Brian, "Loyalty Tests and Guilt by Association", 61 *Harv. L. Rev.* 592 (1948).

2. Herbert Elliston, "The Integrity of Justice Hughes", *The Atlantic Monthly*, April, 1952, Volume 189, No. 4), page 73.

with the vital issue of constitutional liberty—as much an indictment of self-complacency as of the curse of professional specialization.

I doubt whether such a serious indictment of the Bar could be sustained on the merits. Perhaps Mr. Elliston has not had access to all the current legal literature on the subject. But, however that may be, if a highly regarded editor of one of our great newspapers holds such an opinion of us, we had better take a long, critical look at ourselves.

Consider also this startling statement, made in cold print recently by a professor of law at one of our best law schools:[3]

> Our men of the Law have not been wise to let slip a standing which, in this country, they used to have. They used to be, as of course (along with preachers, prophets, and successful generals), the people on whom other people called to tell them what any trouble was all about . . . . A century or so ago, names like John Adams, Alexander Hamilton, Andrew Jackson, Daniel Webster, Abraham Lincoln, carried a sure flavor of knowing whither and of telling how, for *All*-of-us. Such knowing of whither and such discovering of how, for *All*-of-us, is still of the essence. It is, in essence, what the institution of law and the men of law are for.

These are harsh words, indeed, useful as criticism, but even more useful as a reminder of traditional responsibility that too many of us may have forgotten. I do not want to engage in added self-criticism, however, for I believe it is evident that most lawyers are uneasily aware of whatever shortcomings exist in the profession today.

Bar Has Many Opportunities for Action

Nevertheless, I should like to draw your attention to an opportunity for action by the Bench and Bar which I think would do much to revive our reputation for leadership in times of stress. The opportunities for forward-looking action are many —expanded support of Legal Aid, the willing defense of unpopular causes, for example. But there is one area among all of these that seems to me to cry out for our best professional attention today. This is the area referred to by Mr. Elliston—the investigative process as it is now being conducted, both at the national and state legislative levels.

No thoughtful citizen would deny the power of Congress to investigate. Indeed, the congressional investigation is an essential adjunct to the legislative function. Historically its purpose is threefold: first, to seek information as a basis for the formulation of legislation; second, to determine whether executive and administrative agencies are properly performing their functions; and third, to influence public opinion.[4] (There is considerable doubt, I think, as to the legitimacy of the last of these.)

The history of congressional investigations in this country—which I shall review very briefly—is a record of slowly but steadily broadening implied powers of the national legislature. Although the authority of Congress to conduct inquiries and to compel the disclosure of information has at times suffered reversals—including a serious rebuff from the Supreme Court in 1881—any ground thus lost has been recovered and eventually extended.[5]

In 1792, within three years of the establishment of our Government, the House of Representatives launched the first congressional investigation. A special committee of seven members, with power to summon persons and papers, was directed by resolution to inquire into the reasons for the failure of the Northwest Expedition against the Indians, led by General St. Clair.

After almost a century of substantially unhampered progress, during which the practice was nurtured to strength and effectiveness by a host of precedents, it suddenly ran into rough judicial waters in the case of *Kilbourn* v. *Thomson*,[6] one of the two major pronouncements by the Supreme Court on the power of congressional investigations.

In the *Kilbourn* case the House was denied the right to inquire into "the nature and history of a real estate pool", and transactions involved in the bankruptcy of Jay Cooke and Company. This was the holding although the manager of the pool was before the committee and the stated basis of the inquiry was that "improvident deposits" of public money had been made with the London branch of the bankrupt company which had a substantial interest in the pool. Mr. Justice Miller vigorously denounced the House resolution involved as being a ". . . fruitless investigation into the personal affairs of individuals". The Court said that the House had assumed "clearly judicial" power which "could only be properly exercised by another branch of the Government".

The *Kilbourn* decision seemed to support the thesis that a broad area of the private affairs of citizens is immune from congressional scrutiny. The Court, however, skillfully sidestepped the question of whether Congress was empowered to investigate in aid of its legislative function, and punish for contempt in the process. In doing so, the Court cast grave doubt—a doubt which continued for almost half a century—as to the existence of any such power.

Nevertheless, both Houses of Congress continued to investigate. The inquiries ranged all the way from a dispassionate investigation of the needs of an administrative or executive department to a deliberate and frequently politically-inspired attack on an administrator or an executive agency. Many investigations also were instituted for the primary purpose of obtaining facts which would reveal what legislation, if any, was desirable in the premises. Another purpose of some investigations was to influence public opinion in favor of particular legislation.

Teapot Dome Scandal Leads to Test of Congress' Power

There arose out of the scandals of the Harding regime a clear test of the congressional investigative power,

3. Llewellyn, "Law and the Social Sciences—Especially Sociology", 62 Harv. L. Rev. 1268 (1949).

4. See Carr, "The Un-American Activities Committee", 18 U. of Chi. L. Rev. 598, 599 (1951).

5. See McGreary, "Congressional Investigations: Historical Development", 18 U. of Chi. L. Rev. 425 (1951).

6. 103 U. S. 168 (1880).

which reached the Supreme Court in the celebrated case of *McGrain* v. *Daugherty*, decided in 1927.[7] In 1924, a Senate Select Committee had undertaken an investigation into the administration of the Department of Justice under Attorney General Harry Daugherty. In the course of the investigation a subpoena was served upon Daugherty's brother, who was president of a bank in Ohio.

In a unanimous decision, the Supreme Court dispelled any doubts as to the power of Congress to investigate in connection with its legislative function. The Court ruled that both Houses of Congress had broad discretion in such investigations. It pointed out, however, that "neither House is invested with general power to inquire into private affairs and compel disclosures", and that "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry".

Although the Supreme Court thus clearly indicated that there are limits upon the scope of congressional inquiries, the courts in recent years have given little, if any recognition to them. Apparently, if the inquiry has any relevance whatsoever, no matter how remote, to some possible legislation, it is now within the power of Congress to investigate.

In the days of the Teapot Dome scandals during the Harding Administration, congressional investigations reached new heights of importance and public attention. Led by men like Senators Walsh and Wheeler, the Senate investigations attracted for many months the avid interest of the public.

Such investigations generally earn wide public approbation. Down through the ages, ever since the first government was formed to serve the community, men consistently have reacted promptly and vigorously to venality in office.

Oliver Wendell Holmes once said: "Men must turn square corners when dealing with government." We seem recently to have forgotten these words of wisdom.

Perhaps in these times when we hear almost daily of some new form of venality in government, we may recall with comfort the voice of George Washington, crying out at littleness in his own time and saying:[8]

> Such a dearth of public spirit and want of virtue, such stock jobbing and fertility in all the low arts to obtain advantages of one kind or another, I never saw before, and I pray God I may never be witness to again. I tremble at the prospect. Such a dirty, mercenary spirit pervades the whole, that I should not be at all surprised at any disaster that might happen.

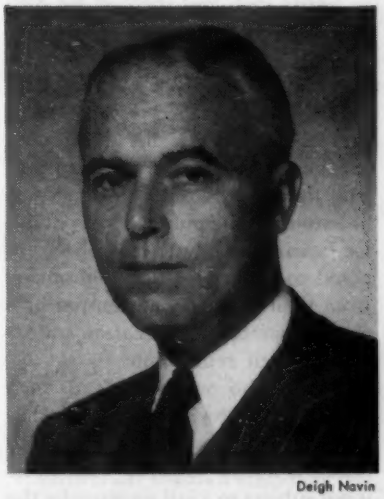
We can asssert with confidence, I think, that a free people will discipline any force that tends to violate their best interests. Corruption in government, of course, is one of these. The primary danger is that in choosing the tools for the task, we may overlook some of the basic rights which are the foundation stones of our society.

Since the *Daugherty* case, literally hundreds of congressional investigations have been conducted. Those who have examined the record with care say that, as a rule, congressional investigating committees have conducted their inquiries with due consideration of the public interest and with fairness to the organizations and individuals concerned.[9] But there have been some conspicuous exceptions—even in our time.

Congressional Investigations Resemble Grand Juries

Congressional investigations which are launched for the purpose of inquiring into questions of personal conduct, closely resemble the inquisitorial functions of our grand juries. As all lawyers know, in any investigation or grand jury proceeding, it is inevitable that many fruitless lines of inquiry will be undertaken. And so some false leads must be pursued. The inviolate rule of secrecy in a grand jury proceeding is predicated upon the urgent necessity of protecting the good name of the many innocent persons who must be questioned and who, through no fault of their own, might be under suspicion before a determination is made as to which, if any, of those under investigation will be subjected to indictment or other action.[10]

But no such protection is accorded to those who are so unfortunate as to be required to testify before many of our congressional committees. Not only are witnesses interrogated in public, but they are denied basic constitutional safeguards which in a court proceeding are granted as a matter of right, even to one who, after investigation, has been accused of a crime. The constitutional safeguards to which I refer, of course, are the rights of the accused to be informed in advance of the nature of the charges against him; his right to be confronted with the witnesses who testify against him, and to subject them to cross-examination; his right to compulsory process for obtaining witnesses in his favor; his right to be represented by counsel; and his right



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William T. Gossett has been with the Ford Motor Company since 1947. A native of Texas, he practiced law in New York City from 1929 to 1947, working mostly in the fields of corporate finance and antitrust law. He was general counsel of Bendix Aviation Corporation from 1945 to 1947.

7. 273 U. S. 135 (1927).
8. Quoted by Professor Warren in "Corruption in Politics", *Current History*, February, 1952 (Volume 22, No. 126), at page 67.
9. See Galloway, "Congressional Investigations: Proposed Reforms", 18 *U. of Chi. L. Rev.* 478 (1951).
10. Compare 24 *American Jurisprudence* §47.

to testify then and there in his own defense.

Congressional investigations which delve into matters of personal conduct assume the aspects of a trial and thus abridge the rights of individuals, guaranteed by the Constitution. And there have been cases in which, as a result of the publicity of committee hearings, witnesses have been exposed to such penalties as dismissal from their jobs, loss of pension payments, character assassination and injury to their reputations.

Those who would defend such practices are quick to point out that a witness before a congressional committee is not in jeopardy—that is, he is not subject to a jail sentence by the committee in connection with the matter about which he is being interrogated. But the argument ignores the fact that the committee has the power to sully a man's reputation unmercifully, and to many men a good name is fully as important as merely being out of jail. Moreover, a committee can send a witness to jail for refusal to answer a question—even one which a court might not require him to answer.

The practices of investigating committees thus are without proper standards. Persons are now subpoenaed before such committees and afforded no right to counsel. Although they often are subjected to the most searching cross-examination themselves, they are denied the right to cross-examine those who testify against them. If they are so-called hostile witnesses, they often are not even accorded the right to make a statement—prepared or otherwise; and if the behavior of the witness is such as not to please the committee or some of its members, he can be summarily punished.

Some committee members seemingly have viewed the committee as a final court of justice sitting in judgment on the conduct of individuals appearing before the committee. Thus they usurp the judicial function. On the other hand, committee members can and do slander witnesses with impunity, secure in the knowledge that there can be no retaliation in court.[11]

Use of Television Creates New Problem

Not long ago, we were treated to the spectacle of a peripatetic committee that moved from city to city and forced private citizens to appear before them and discuss their personal affairs, all to the edification of a vast television audience. It was entertaining, to be sure, and without any doubt it aroused great public interest in the scope and influence of crime in this country. But it also disregarded the civil rights of many individuals. And although many of those particular individuals were notorious, let us realize that the principles applied to them may by the same precedent be applied some day to decent and respectable people.[12]

Thus, television has brought the issue to the forefront; but television only aggravates an abuse which has been going on for decades.

Aside from the televising of the hearings—thus making a carnival of the whole proceeding—the committee to which I have referred conducted itself with decorum. And the committee deserves commendation for various measures proposed by its chairman to promote fairness on the part of all investigative committees.[13] But in the absence of strict rules to guide and limit them, committees cannot be depended upon to proceed with decorum or fairness. There is too much of a temptation to conduct the hearing in a manner best calculated to advance the political interests of the members of the committee —to dwell on the sensational and lurid aspects of the evidence, without regard to the rights of witnesses.

In such an inquiry there is no assumption that the individual is innocent until proved guilty. There are none of the safeguards of a trial to which, by the Constitution and the law, each man is entitled. Instead, there is a type of trial by public opinion, a pillorying of individuals not accused of crimes—of individuals only suspected of being engaged in or knowing something about some improper activity. And the rules are the same whether the witness is innocent or guilty.

To summarize the matter: While we all have an earnest desire to expose and eradicate crime and corruption, we cannot but deplore the means frequently used to attain that end. It must be apparent that if such tactics are permissible with respect to suspected criminals, they may also be permissible with respect to persons who hold views in conflict with those of the overwhelming majority. Thus, we run the risk that we might all become guilty of imposing that "tyranny of the prevailing opinion and feeling" which John Stuart Mill believed so serious a danger to democracy.

It seems to me that there is thus presented to the Bench and Bar of this country the duty of a calm reappraisal of the concept of the legislative investigations—their purposes, their scope and their procedures. Under what circumstances and under what procedure, for example, should any legislative committee be permitted to "investigate" the affairs of a private citizen? Should not such investigations afford the individual at least that protection to which he is entitled before a grand jury? Why should legislative committees be permitted to conduct political guerrilla warfare in the name of preparing legislative measures and in the process, besmirch private citizens, public officials and each other?

I am aware that many similar questions urgently need answers. But in my opinion, there is today no challenge to the latent greatness of the American Bar that so demands action. I believe this because I believe it is here in the growing misuse of the investigative process that the rights of the individual are being most grievously assaulted. Whenever in our national life such a situation comes into being, I believe it is the duty of lawyers to take the leadership in asking the questions and propos-

(Continued on page 866)

11. See Carr, *supra*, at page 599, *et seq.*

12. See the statements made by Dean Alfange, of the New York Bar, in his letter of May 22, 1951, to the *New York Times*, published by the *Times* on May 27, 1951.

13. See, for example, the "Statement of Senator Estes Kefauver (Tenn.) Before Senate Committee on Expenditures in the Executive Departments, June 6, 1951."

The 1952 Ross Prize Essay:

Concurring and Dissenting Opinions

by **R. Dean Moorhead** • of the Texas Bar (Austin)

■ The 1952 annual Ross Prize essay competition dealt with the subject, "The Functions of Concurring and Dissenting Opinions in Courts of Last Resort". This is the winning essay in the nineteenth annual competition conducted by the American Bar Association under the terms of the will of the late Judge Erskine M. Ross, of California. The Committee of Judges, composed of Judge Carl V. Weygandt, of Cleveland, Ohio, Chairman; Professor Frank E. Horack, Jr., Indiana University School of Law; and George Bouchard, Los Angeles, California, unanimously selected this as the winning essay from the thirty-four entries.

■ For more than a decade after the creation of the United States Supreme Court, its Justices followed the English custom of delivering *seriatim* opinions whereby the views of each member of the Court were made known. Indeed, the first reported opinion of a Justice is a dissent which was delivered under the *seriatim* procedure.[1] However, when John Marshall became Chief Justice, he disregarded this custom and established the practice of announcing judgment in an opinion assented to by a majority of the Court.[2] According to Beveridge,[3] Marshall thus "took the first step in impressing the country with the unity of the highest court of the Nation". In the same vein, another biographer[4] has said that "the change was admirably adapted to strengthen the power and dignity of the Court". This sentiment has by no means been universal. Marshall's innovation has been referred to as a "vicious practice".[5] Thomas Jefferson called it "cooking up opinions in conclave" and a "dangerous engine of consolidation".[6] James Madison was also critical.[7] Nevertheless, the unanimity engendered by Marshall prevailed for more than a century, with but relatively few concurring and dissenting opinions being delivered.[8]

In 1939, Justice Frankfurter expressed regret over the passing of what he termed "the early healthy practice whereby the Justices gave expression to individual opinions".[9] Occurrences since that date should serve to temper his regret, for so great has been the increase in the number of concurring and dissenting opinions that, in litigation involving controversial social or economic matters, the Supreme Court's opinion procedure has now become more akin to the original *seriatim* practice than it is to the virtual unanimity which ensued after Marshall ascended the Bench.[10]

This increased volume of concurring and dissenting opinions has been criticized by writers in both popular and legal publications who have charged that the Court's multiple opinions shatter public confidence in the certainty of the law;[11] that such opinions injure the Court's prestige;[12] and that they encourage litigation.[13] With equal fervor, the increased use of concurring and dissenting opinions has been defended.[14] Although the United States Supreme Court has been the focal point of this debate, the arguments advanced by both sides are equally applicable to any court of last resort.

1. *Georgia v. Brailsford*, 2 Dallas 402, 415.

2. On scant evidence, one historian has asserted that Marshall did not originate this practice. See Warren, *The Supreme Court in United States History*, Volume 1, pages 653-654 (1947). But see the authorities cited in notes 3 and 4, *infra*. Even if Marshall did not originate the practice, he cemented it and was the first to employ it in important cases.

3. Beveridge, *The Life of John Marshall*, Volume 3, page 16 (1919).

4. *Encyclopaedia Britannica*, Volume 14, page 969 (1951).

5. Shirley, *The Dartmouth College Causes*, pages 309-310 (1879).

6. Ford, *The Works of Thomas Jefferson*, Volume 12, Letters of June 12, 1823, and June 13, 1823 (1904-1908).

7. *Letters and Other Writings of James Madison*, Volume 3, page 327 (1865).

8. There were exceptions. See Levin, "Justice Johnson Dissenter", 43 *Mich. L. Rev.* 512 (1944), and note the 169 dissents of Justice Miller, 9 *A.B.A.J.* 536 (1923).

9. *Graves v. People of State of New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939).

10. See Pritchett, "The Coming of the New Dissent: The Supreme Court 1942-1943", 11 *U. of Chicago L. Rev.* 49 (1943); Lashly and Rava, "The Supreme Court Dissents", 28 *Wash. U. L. Q.* 191 (1943); *Newsweek*, June 15, 1942, page 28.

11. Supreme Court as Well as Nation Confused by Maze of Disagreement", *Newsweek*, February 14, 1944, page 56; Chamberlain, "The Nine Young Men", *Life*, January 22, 1945, page 76; Ballantine, "The Supreme Court: Principles and Personalities", 31 *A.B.A.J.* 113 (1945).

12. *Time*, October 9, 1944, page 21.

13. Palmer, "Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents", 34 *A.B.A.J.* 677 at 680 (1948); Pollitt, "What Is Wrong with the Supreme Court of the United States", 25 *Fla. L. J.* 233 (1951).

14. Frank, "The Divided Supreme Court", *New Republic*, June 18, 1945, page 833; 43 *Harv. L. Rev.* 47 (1929); 26 *Jour. Am. Jud. Soc.* 78 (1942).

As is usually the case in controversies of this character, much of what has been said by each side is true.

Most certainly, concurring and dissenting opinions are to be deplored if they result from personal rivalry or enmity among the members of a court,[15] or if they are products of bemused reasoning or of a lack of judicial experience or temperament.[16] With equal certainty, such an opinion should be condemned if it springs from a desire to indulge in judicial legislation; if it is an attempt to make an *ad hoc* disposition of a case according to its writer's individual concept of justice; or if, regardless of precedent, it is born in a preconceived political or economic philosophy.[17]

However, no criticism can justly be directed at an opinion which is motivated by honest conviction, which respects the doctrine of *stare decisis*—even though it might urge the overruling of a particular precedent—but which expresses a sincere belief that the court employed the wrong rationale or arrived at an erroneous result. Without doubt, even such a concurring or dissenting opinion may impair the court's prestige in the eyes of the public or lessen confidence in the certainty of the law. Nevertheless, as the late Chief Justice Hughes wrote:[18]

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided; and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.

So long as this nation is blessed by having men of intellectual honesty occupy the benches of its appellate courts, the decisions of such courts will, from time to time, be attended by concurring and dissenting opinions. Despite debates as to whether such opinions should be suppressed or encouraged, it is an undeniable fact that such opinions will continue to occur. In view of this fact, it behooves the Bar to ascertain the proper functions of concurring and dissenting opinions, and to extol the opinions which perform these functions, while decrying those which do not.

Jefferson Wanted Opinions as Basis for Impeachment

In this country, the first function proposed for concurring and dissenting opinions is easily the most novel. Thomas Jefferson suggested that each Justice should be required to write an opinion in each case; that Congress should denounce the opinions with which it disagreed; and, if the Justices thereafter failed to conform their opinions to the conclusions of the Congress, that such opinions should be used as grounds for impeachment.[19] Drastic though this proposal was, it at least involved recognition of the fact that the use of concurring and dissenting opinions affords a better basis for appraising the caliber of appellate judges than does the use of but a single majority opinion. Hence, in jurisdictions in which appellate judges must periodically stand for re-election, concurring and dissenting opinions broaden the basis upon which a voter can evaluate a candidate. As a practical matter, it may well be doubted if the quality of an elected judiciary is ever measurably affected by the voters' scrutiny of judicial opinions; however, whether used or not, such opinions are criteria which are available for both the public and the legal profession to employ at the polls to separate the able from the inept and the industrious from the sluggards.

In addition, any concurring or dissenting opinion performs other salutary functions. The presence of such an opinion assures both counsel and the public that the writer has devoted thought and effort to the case. Such an opinion also reveals that the decision of the court has not been perfunctory, and that, although accompanied by disagreement, the decision resulted from deliberation and debate. On the lighter side, a dissenting opinion enables a losing attorney to console his client by demonstrating that at least one member of the court was possessed of gray matter. If it be true that adverse psychological effects arise from the mere fact that any concurring or dissenting opinion is written, such effects are in part offset by the thought and industry which such opinions reveal.

Thus, as a matter of psychology, concurring and dissenting opinions give assurance that a case has received careful consideration. As a matter of politics, such opinions afford a broader basis for the casting of a ballot; and, as a matter of morals and good conscience, such opinions enable their authors to express their convictions in lieu of silently assenting to a majority opinion in which they do not believe.

However, all of these functions are tangential and relatively minor. The primary objective of the law is to achieve just results through the careful formulation and application of a system of legal principles. The most important objective of an attorney is to become skilled in predicting which legal principles are applicable to his clients' factual situations. Concurring and dissenting opinions can perform their greatest functions by aiding in the attainment of these two objectives. Indeed, it is imperative that they perform such functions. If they do not, they should not be written.

Dissent May Be an Appeal "to the Intelligence of a Future Day"

A majority of a court is not infallible. Majorities sometimes err in the

15. 39 *Am. Pol. Sci. Rev.* 42 (1945); *Time*, May 13, 1946, page 23; *Colliers*, August 17, 1946, pages 12-13.

16. "Second Rate Men on a First Rate Court", *Newsweek*, July 15, 1946, page 108.

17. 35 *Am. Pol. Sci. Rev.* 890 (1941).

18. Hughes, *The Supreme Court of the United States*, pages 67-68 (1936).

19. Warren, *op. cit. supra*, note 2, pages 655-656.

reasoning which they adopt, in the results which they announce, or in both. Each such error mars our jurisprudence. When these errors occur, it is highly desirable that attention be called to them, and that an appeal be made to the intelligence of a future day.[20] Employed for this purpose, concurring and dissenting opinions perform a most worthy service.

Upon occasion, the opinion of a majority will not actually be erroneous, yet it will verge upon error by straining a legal doctrine to its utmost. In such a situation, a considered and well-stated concurring opinion can be of value by warning that the doctrine must not be pressed too far. In other instances, a majority may announce a doctrine which is sound when applied to the facts before the court, but which would be wholly unsound if given a general application. Here again, a timely concurring opinion may suffice to check any extension of the doctrine, and thereby better our jurisprudence.

Concurring and dissenting opinions can also improve the craftsmanship of a court. When the writer of a majority opinion knows that any defect in thought or expression will be seized upon and will be made the subject of criticism in a concurring or dissenting opinion, certain it is that he will labor with increased vigor to rid his opinion of defects. With the threat of a concurring or dissenting opinion, "the bench does its work under constant self-criticism. The spokesman for the court is forced to choose his position with care, to draw his conceptual lines sharply, and to keep his holdings from becoming over-abstract."[21]

However, it is in the field of prediction that concurring and dissenting opinions attract the most attention and evoke the most comment. Moreover, it is in this field that such opinions can be of greatest service to the legal profession.

One aspect of prediction is general in nature. When a new member joins a court, all of his opinions are studied by the Bar in order that clues to his ability, his technique and his predilections may be obtained. Many such clues can be gleaned from the opinions in which he expresses the majority view, but clues of a more intimate and individual nature may be gathered from the concurring and dissenting opinions in which he delineates the personal reasoning which has set him apart from his brethren. If the new member has had prior judicial experience, many of his traits will already be known to the profession. However, in a court such as the United States Supreme Court in which few recent appointees have had prior experience on the Bench, a new member's opinions serve an especial function by introducing him to the Bar and by affording a basis for general prediction as to his future judicial utterances.

Certain other aspects of prediction are elementary. When a court experiences a sharp change in the personnel and philosophy of its members—such as the change which occurred in the United States Supreme Court during the 1930's—it requires no clairvoyant to perceive that the dissents of a Holmes will become the opinions of the majority. When the division in a court has been close on a certain question, and one member is subsequently replaced by a newcomer, quite often a mere knowledge of the newcomer's political affiliation will make simple a prediction as to whether the dissents or the majority opinions will thereafter represent the law on such a question. Knowledge of a new judge's prior judicial expressions may also make prediction an easy matter. Thus, *Jones* v. *City of Opelika*[22], was a five-four decision, with Justice Byrnes being a member of the majority. However, he was thereafter succeeded by Justice Rutledge, and, in a dissent in a lower court, Justice Rutledge had previously expressed views which were inconsistent with the majority opinion in the *Opelika* case.[23] Hence, a prophet had scant reason for surprise when, within three months after Justice Rutledge joined the Court, the decision in the *Opelika* case was vacated.[24]

However, much more important than matters such as these is the use

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which, at times, can be made of concurring and dissenting opinions in predicting how the same court, with the same personnel, will decide a subsequent case. Concurring and dissenting opinions are keen tools with full utility when their nature is such that they can be used for this purpose. *Interstate Oil Pipeline Company v. Stone*[25] and *Spector Motor Service v. O'Connor*[26] illustrate one method in which concurring and dissenting opinions can be so employed.

Both cases involved the power of a state to levy taxes upon commerce. In the *Interstate* case, the tax was levied upon the operation of pipelines in which oil flowed from the wells to racks adjacent to a railroad. At the racks, the oil was pumped into tank cars, and it was then transported out of the state. Four members of the Court joined in an opinion in which they said, in effect, that the tax appeared to be upon an intrastate activity, but that it was unnecessary to decide whether the ac-

20. The phrasing of the latter clause is filched from Hughes, *op. cit. supra*, note 18, page 69.

21. *Encyclopedia of the Social Sciences*, Volume 8, page 455 (1948).

22. 316 U.S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942).

23. *Bussey* v. *District of Columbia*, 129 F. 2d 24, 28 (1942).

24. *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943).

25. 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949).

26. 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

tivity was intrastate or interstate, since even if it were the latter, the tax did not discriminate against interstate commerce and could not be repeated by any other state. Because of this, these four Justices said that the tax was valid even if the pipelines were deemed to be segments of interstate commerce. In a short concurring opinion, Justice Burton agreed that the tax was valid, but he based this conclusion solely upon his belief that the pipelines were intrastate in character. The remaining four Justices joined in a dissent in which they denounced the theory that interstate commerce can be burdened by even a nondiscriminatory tax which cannot be repeated by another state.

In the *Spector* case, the tax was imposed upon the operation of motor trucks which picked up goods within a state and delivered them to terminals from whence other trucks carried the goods on interstate journeys. As was also true in the *Interstate* case, the tax did not discriminate against interstate commerce, and it did not subject the taxpayer to the risk of having the tax be repeated by another state.

To a casual seer, it might have appeared that the pick-up trucks in the *Spector* case were on a par with the gathering lines in the *Interstate* case, and, since the taxes in both cases were nondiscriminatory and involved no risk of double taxation, that the tax in the *Spector* case would be upheld by another five-four decision.

However, in interpreting and applying the tax statute in the *Interstate* case, the state court had held that the operation of the pipelines was intrastate in character, and had said that the tax would be applied only to intrastate operations. An analyst could speculate that this holding induced Justice Burton's conclusion that the operation of the pipelines was intrastate. Contrariwise, in the *Spector* case, the state court had held that the trucks were a part of interstate commerce, but had said that the tax applied nevertheless. Consequently, if, in the *Spector* case, Justice Burton would again accept the holding of the state court regarding the nature of the activity which was taxed, the question before the Court would become one of whether a nondiscriminatory tax involving no risk of double taxation can be sustained against interstate commerce. With the question thus framed, the concurring opinion of Justice Burton in the *Interstate* case, together with the known views of the four dissenting Justices, would afford a clear basis for believing that the tax would be held invalid.

Trial Court Predicted the Decision of the Supreme Court

The trial court perceived this, and predicted as follows:[27]

> it would appear that a majority of the present court would hold it [the tax] in violation of the Commerce Clause—that is, the four justices who dissented in Interstate Oil Pipeline Company v. Stone, 337 U. S. 662, and Mr. Justice Burton, who concurred in the judgment in that case solely on the ground that the commerce taxed was intrastate.

This prediction was accurate. The tax in the *Spector* case was struck down, with Justice Burton writing the majority opinion (in which he expressly adopted the holding of the state court that the trucks were in interstate commerce) and being joined by the four Justices who had dissented in the *Interstate* case.[28]

Predictability can be affected either by the presence or by the absence of concurring and dissenting opinions. In the foregoing situation, predictability was aided by the manner in which the Justices expressed their different viewpoints. A converse situation is illustrated by *McDonald v. Commissioner of Internal Revenue*.[29] Involved in that case was the question of whether campaign expenses of a judge are deductible items for income tax purposes. Four Justices joined in an opinion holding that such expenses are not deductible. They employed various premises in arriving at this conclusion. A fifth Justice concurred in this result, but wrote no opinion and gave no indication of the reason for his concurrence. The other four Justices united in a dissent in which they challenged the premises employed by the first four. If a subsequent case with somewhat different facts should arise, what are the odds on how it might be decided? No one can venture a logical prediction. Yet if the concurring Justice had emulated Justice Burton in the *Interstate* case and had made known the reason which supported his concurrence, a question which is now wholly unsettled might at least be reasonably clear.

Justice Jackson has recently stated that it is best that the division on a court "be forthrightly exposed so that the profession will know on what narrow grounds the case rests and can form some estimate of how changed facts may affect the alignment in a subsequent case".[30] A limited exposure of divergent views—such as that in the *McDonald* case—falls short of the requisite forthrightness and stultifies prediction.

However, to urge that disagreements among the members of a court often should be reflected in concurring or dissenting opinions is by no means to say that the degree of predictability necessarily increases in proportion to the number of concurring and dissenting opinions which are written. Indeed, the contrary quite often is true. Theories can be spun so fine, and hairs so delicately split, that concurring and dissenting opinions may shoot off in all directions, like sparks from a pinwheel, and render prediction impossible. Thus, only eight Justices participated in the decision in *State of New York. v. United States*,[31] yet four opinions were written. The opinion of the Justice who announced the decision of the Court was concurred in by one other Justice, but the latter Justice also wrote a separate concurring opinion. Four Justices joined in a second concurring opinion, and two wrote a dissent. So varying are

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27. *Spector Motor Service v. McLaughlin*, 88 F. Supp. 711 at 713 (1949).

28. Plus a sixth Justice who had joined the Court in the interval between the two cases.

29. 323 U.S. 57, 65 S. Ct. 96, 89 L. Ed. 68 (1944).

30. 37 A.B.A.J. 801 at 863 (1951).

31. 326 U.S. 572, 66 S. Ct. 310, 90 L. Ed. 326 (1946).

The Bar and the Public:

The President's Annual Address

by **Howard L. Barkdull** • President of the American Bar Association, 1951-1952

▪ President Barkdull's Annual Address, delivered in accordance with the mandate of the Association's By-Laws, took the form of a report on his observations and recommendations after a year of constant travel and contact with lawyers in all parts of the United States. His findings show that public relations continues to be one of the great problems of the profession if the Bar is not to lose the public esteem and leadership that have always been the tradition of the American lawyer. He urged every lawyer to enlist in the campaign to advance the six-point long-range program of basic objectives adopted by the House of Delegates at the 1951 Annual Meeting.

▪ It seems fitting and proper that an annual address should deal with a subject that is understood by the President, on the basis of his own experience, something he really knows at first hand. During the year terminating at the Annual Meeting, he has devoted his entire time to the interests of the Association, and he is in a position to speak more convincingly and with greater authority on a topic having to do with the Association itself than concerning questions beyond his personal knowledge. Election to the Presidency of the American Bar Association does not indicate that a person is qualified to express himself with authority on any issue in our modern complex society. Having had fewer hours, during his year in office, than the average member of the community, to read books and periodicals, he is in fact less qualified than most of you to deal with subjects of general interest; but he is completely steeped in the activities of the organized Bar, and that is what he is best qualified to talk about.

A new feature of the AMERICAN BAR ASSOCIATION JOURNAL, entitled "Current Outlook", edited by our Director of Activities, Edward B. Love, contains in the August issue a commentary bearing the title "A President's Finest Hour". It includes the following:

> The distilled and universal wisdom and scholarship contained in many annual addresses has undoubted value and interest, but a president's real problem is not what will reflect the most historical glory upon him nor what will advance his private convictions in any field, but what will be most immediately useful and helpful to the members of his association.

The present annual address had been prepared prior to my receipt of the August JOURNAL (mostly during the course of a two weeks' fishing trip in July on a cabin cruiser, at moments when the fish were not biting, either in the waters of Georgian Bay or around the table of that great American game wherein so many fishermen are known to indulge). Without any collaboration, Ed Love and I have reached the same conclusion as to the proper character of a president's annual address, although I have not gone quite to the extent he recommends.

In the course of visits among the various states during the past twelve months, as your representative, I have attempted to carry the message of the American Bar Association to the Bar of the country. A considerable majority of the lawyers in these audiences are not members of the Association, with the result that the President is dealing primarily with those who look at the Association from the outside.

Most of these talks have been serious in nature and they have referred to the problems of the legal profession and of the organized Bar. An attempt has been made to convey in every address a distinct message. Emphasis has been placed on the responsibility of the organized Bar to the public, and it has been pointed out that five out of the six long-range objectives, adopted by the House of Delegates at the Annual Meeting in New York one year ago, relate to the public obligations of the lawyer, and only one has to do with the profession itself.

This morning in speaking for the last time as your President and just a few days before delivering the gavel to my worthy successor, Robert G. Storey, I plan to summarize the experiences of the sixty major addresses delivered during the past year and to point out the conclusions result-

ing from the traveling, the meeting and conversing with thousands of lawyers and judges, attending state bar conventions, directing and observing the activities of our large network of Committees and Sections.

Just as I have talked shop with most of these people it is shop that you will hear from me today. This is said by way of introduction and not at all in the nature of apology. Your ambassador has returned from his journeyings and in these thirty minutes will make his report to you, with his observations and recommendations based upon the intensive work surrounding his year in office.

The reason for choosing the subject, "The Bar and the Public", is twofold: first, it touches on one of the highly important problems facing us, to wit: the relationship of the legal profession to the people of the United States, and second, it embraces a very considerable number of our major objectives, all having a direct bearing on the attitude of the public toward the Bar.

To some extent what I have to say to you this morning will cover many of the same items included in the Survey of the Legal Profession. While I have not yet had an opportunity to examine the final report of Reginald Heber Smith, Director of the Survey, all of us have been reading with great interest the many Survey reports published from time to time. More than we can realize, these reports and the ideas reflected by them have influenced our thinking, just as the Survey itself will have a profound effect upon the legal profession and the organized Bar over a long period of years.

Attitude of the Public

Some people have sensed a critical attitude on the part of the public toward the organized Bar, but not extending to the individual lawyer. It is claimed that the average layman will stand up for his own lawyer and at the same time decry lawyers in general, also criticizing the operation of the courts. According to this point of view, the average layman looks upon his own lawyer as a high-minded, honest man, chosen as such to represent his interests, carefully selected by him out of a group containing some whose ideals are less elevated and whose sincerity may be subject to some question. The same situation is said to occur in the medical profession, one's own doctor who is the subject of personal choice and careful selection being considered far superior to the general run-of-mine. On the other hand, the position is taken by George Maurice Morris, one of my illustrious predecessors, that the public thinks better of the bar association than of the individual lawyer, citing the statement frequently made by members of the lay public that if Lawyer Brown doesn't watch his step they will refer him to the bar association for necessary action.

It seems to me that the truth is somewhere between these two positions. The average layman does have respect for the bar association as such and his attitude is even better as to the individual lawyer whom he has chosen for his counsel, but he is well aware of the fact that borderline members of the profession are to be found in every city, most of whom do not belong to the bar associations except in the integrated states.

The attitude of the public toward the legal profession is not as unfavorable as many persons have tried to make out, certainly not of a character sufficiently adverse to warrant a public relations campaign of self-praise by the organized Bar with the objective of selling the merits of the legal profession to the people.

If something is wrong, the remedy is not difficult to discover, and the fact is perfectly clear that the curative measures can better be taken by the lawyer through the instrumentality of his bar association rather than by any measures he might as an individual adopt. Naturally what the public thinks of the lawyer is a matter of great concern to the profession. Approval, respect and confidence on the part of the public is something the lawyer should seek. The individual lawyer does in fact appreciate the necessity of standing well with his fellows. Sometimes he is inclined to carry on a certain amount of personal advertising of his capacity and fitness, and it has taken rather strict and explicit canons of ethics to curb his natural inclinations in that regard.

I submit that in the long run the most effective way for the profession of the law to improve its relations with the public and to bring about a more favorable attitude toward the lawyer on the part of the people is by deserving such an opinion on the basis of conduct and performance. An attempt will accordingly be made in addressing you this morning to review the situation as to what the Bar is doing for the public, to create the proper attitude. The lawyer cannot live in a vacuum. The law is closely related to American life, liberty, freedom, property and government. It is the public of the United States we are serving; it is the public we must satisfy and convince; it is the public that must understand us correctly and appraise the profession on the basis of its performance.

The determination of our long-range program has in itself gone far in the direction of winning public support for the Bar. It convinces the people that we really do have a program, a plan of action, a set of policies wherein the strength of the legal profession is united, largely for the general good.

A public persuaded of our sincerity of purpose and zealousness in service to all elements in the community will not be receptive to attempts to socialize the practice. Here we have one of the most fruitful methods of encouraging the development of the free enterprise system and discouraging the participation of government in the affairs of the people.

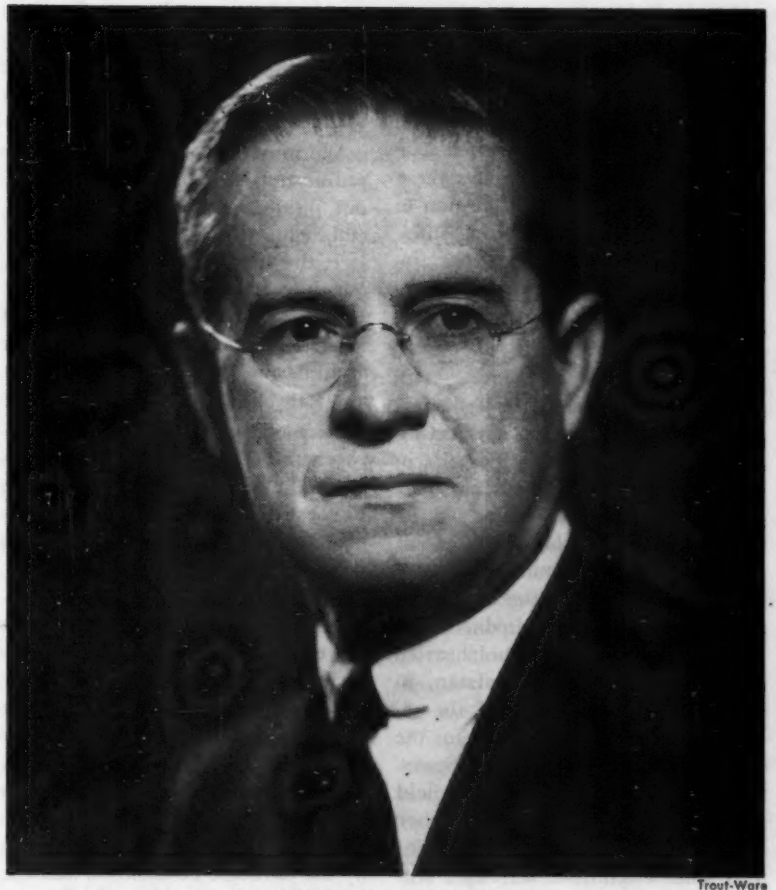
One further benefit resulting from a high regard for the legal profession on the part of the public is in the attracting to the Bar of the most promising material from the younger generation. Too many are now induced to enter business, engineering, medicine and other careers. Ethical standards of the legal profession will automatically be raised, as more and more of the outstanding young men

of the community choose the law as a career, and a corresponding number of borderline cases will be dissuaded from the practice of law by the raising of standards of admission and careful policing of the ranks.

Leadership

The best single method for improving the estimate of the Bar by the public is the providing by the legal profession of a high degree of leadership in the community. The lawyer is better equipped for this purpose than is the businessman or the member of any other profession. It has been called the exclusive talent of the lawyer. He can lead the forces of good citizenship, instilling a high degree of merit in public officers and their administration; encouraging the churches, newspapers and schools; promoting harmonious relations between labor and capital, to the end that the losses resulting from strikes may be minimized, fostering plans for advancing the cause of peace, making known the facts about Communism, improving the administration of justice. These and countless other activities of the legal profession will assist all good citizens in preserving our institutions and perpetuating our way of life.

The public has the right to expect the legal profession to develop the cause of justice under law. Justice is our aim and end; it is what men are demanding: the settlement of disputes among men and among groups of men, without resort to trickery or force, the sanctity of contracts among men and their enforcement by the courts. The principal exceptions, in our day, are labor contracts and peace treaties—both resulting from a resort to force and display of might; strikes preceding the labor contract, wars the predecessor of the peace treaty. These are the outstanding failures,—our inability to settle disputes between capital and labor, without loss to the public and to the parties, and the settlement of international disputes by a series of wars involving untold loss of life and property, extending from the earliest history of mankind down to the present day.



Trout-Ware

HOWARD L. BARKDULL

Strikes and the Public

The importance of labor relations is brought out by a statement relative to the recent steel strike made in a press conference by Defense Secretary Lovett: "No enemy nation could have so crippled our production as has this work stoppage. No form of bombing could have taken out of production in one day 380 steel plants and kept them out nearly two months." Events connected with the settlement of this strike present considerable hope for a closer relationship between capital and labor and the reduction of the role of the Federal Government in this field. There should be no alliance with government either on the part of capital or labor. Participation by the government in labor disputes has resulted in the substitution of political bargaining for economic bargaining. Rather than taking the side of either contestant, government can better adopt the role of fostering the elements leading to an understanding on the part of labor and capital, developing what they have in common. I believe that it is possible for our Section of Labor Law to lend assistance in this direction, to a greater degree than has been done in the past.

International Relations

In a recent book (*The Diary of a Young Girl*, by Anne Frank) the view is expressed that it is not the big men, the politicians and the capitalists alone, who are guilty of war. "The little man is just as guilty, otherwise the peoples of the world would have risen in revolt long ago! There's in people simply an urge to destroy, an urge to kill, to murder and rage, and until all mankind, without exception, undergoes a great change, wars will be waged."

Many of us are of a more optimistic view. In the opinion of some people, there may not be another world war, but a dominant single leader will emerge—the United States, Russia or the United Nations. If the future is to follow these lines, it is for the legal profession to see to it that the dominating influence shall be the free nations, including the English-speaking countries, as against totalitarianism or imperialism of any kind, from any source.

An example of what the legal profession is doing by way of meeting this responsibility of leadership in the international field is found in the positive position taken by the American Bar Association's House of Delegates, on recommendation of the Standing Committee on Peace and Law Through United Nations with the energetic and wholehearted assistance of Frank E. Holman, in advocating the adoption of the so-called Treaty Amendment to the Constitution of the United States. The leadership of the Bar in the field of international relations is further exemplified by a recommendation of this same Committee on Peace and Law, coming before the House of Delegates this week, that to the Treaty Amendment there be added a paragraph on the subject of executive agreements.

Public Relations

Assuming the need for a favorable attitude on the part of the public and for aggressive leadership furnished by the legal profession, we come now to consider the positive steps of the organized Bar in the direction of improving public relations and developing a positive program. Whitney North Seymour expressed the view, in his final President's letter as head of The Association of the Bar of the City of New York, that "All the agitation about the need for improving the public relations of the bar is really just an elaborate reminder that the bar will have no need to worry about its public relations when it lives up to its great traditions. Those can be understood and they touch great chords of the human spirit. And when they are followed we can, as Judge Learned Hand has said, look back without wincing."

We must look to ourselves, if the public is to look to us. The scope of our public relations is all-inclusive, embracing everything we are doing. It is the sum-total of our activities. We have a highly effective Public Relations Committee, whose field of interest includes the work of our Sections and Committees, all the way along the line.

Lack of funds is a distinct handicap here as elsewhere in the development of our work. There is bound to be great competition for the amounts made available by our one source of income: the dues of our members. Each Chairman quite naturally considers his activity the most important on the entire list and entitled to financial preference, but a better over-all view is possible on the part of Public Relations than any other single group, since it is all-inclusive. Occasional grants are to be had from private foundations, for special projects such as the support of the Survey by the Carnegie Foundation and the Commercial Code by the Falk Foundation, but the bulk of our financial support must come from our own dues. The recent increase will produce additional income, and I recommend that our Public Relations Committee be the recipient of a liberal share.

Within the limitations of modest financial resources, our Public Relations Committee has been active in making the role of the lawyer better known to the general public and more favorably regarded by the average citizen; obtaining more effective co-operation on the part of the various media of information and publicity,—the press, radio, television and moving pictures; and advancing the six long-range objectives.

One method for promoting the cause of our public relations, without the expenditure of any additional funds, would be the appointment of the Chairman of the Standing Committee on Public Relations as a member, ex officio, of the Board of Governors. This would insure his presence at all discussions of questions involving Association policy, enabling him to advise the Board as to public relations angles and repercussions, the relationship and effect of proposed courses of action, also keeping him fully posted as to the work of all Committees and Sections and their public relations aspects.

George Maurice Morris, father of public relations so far as the American Bar Association is concerned, defines a public relations program as "Some plan or design for affecting the attitude, or opinion, of some group of people (or people generally) with respect to some individual, collection of individuals or institution". The development of the public relations program of the American Bar Association is so closely related to all the activities of organization that Mr. Morris and all of his successors in the position of Chairman of the Committee have been unanimous in the opinion that our best program can be developed from within, rather than from outside the profession itself.

I am sometimes asked whether there is a relationship between public relations and the lawyer's income. Will the improvement in the public relations of the profession result in an increase in earnings? Considerable publicity has been given to the figures released by the Department of Commerce showing that the average net income of the doctors last year was $12,518, whereas the figure in the case of the lawyer is $9375, approximately 25 per cent less. The relative income of the two groups is undoubtedly influenced by other factors, including the law of supply and demand, but when asked the question as to the effect of public relations on income, I have replied that such a relationship does indeed exist. The fact cannot be overlooked that the American Medical Association devotes to public relations an amount between one and two million dollars a year, while for the American Bar Association the figure is $9,500. As the public comes to a bet-

ter understanding of the proper function of the lawyer and his place in the community, the reliance of the layman on the lawyer will increase, and the members of the legal profession will be called upon to perform an increasing number of services properly within the field of the law.

Specific Means
(a) Law Enforcement

Time limitations this morning will permit no more than brief mention of specific items in our program and their bearing on the favorable attitude of the public. One relates to the responsibility of the legal profession for law enforcement, especially on the local level. A writer in the *Atlantic Monthly,* has emphasized the need for resisting in this field the general trend toward the taking over of various functions by the Federal Government. He points out that law enforcement belongs on the local level, even as against the states themselves, and certainly as opposed to the Federal Government. One of the important functions of the local bar associations is to bring about a sense of local responsibility on the subject of law enforcement. Pressure of public opinion in the city or town, led by the Bar and supported by the newspapers, will compel local authorities to enforce the law.

The report of the American Bar Association's Commission on Organized Crime submitted to the House of Delegates at the February, 1952, meeting calls attention to certain conclusions reached by the Senate Committee To Investigate Crime in Interstate Commerce, as follows:

> Mobsters and racketeers have been assisted by some tax accountants and tax lawyers in defrauding the Government. These accountants and lawyers have prepared and defended income tax returns which they knew to be inadequate.
>
> A major question of legal ethics has arisen in that there are a number of lawyers in different parts of the country whose relations to organized criminal gangs and individual mobsters pass the line of reasonable representation. Such lawyers become true "mouthpieces" for the mob. In individual cases, they have become integral parts of the criminal conspiracy of their clients.

Upon recommendation of the Commission on Organized Crime, the House of Delegates adopted the following resolutions:—

> RESOLVED, That the Commission on Organized Crime, in the name of the American Bar Association, call the attention of the presidents of state and local bar associations represented in the House of Delegates to the urgent need for action against members of the bar who, as public officials or in their private practice, foster organized crime, engage in unethical practices, attempt to bring undue or improper influence on public officials or become party to any action or activity which would bring the law into disrespect or bring disrepute upon the bench or bar;
>
> RESOLVED, FURTHER, That the Commission on Organized Crime in the name of the American Bar Association call the attention of the presidents of state and local bar associations represented in the House of Delegates to those portions of the testimony before the Special Senate Committee To Investigate Crime in Interstate Commerce which raised serious questions about the propriety of the actions of some members of the bar in connection with such activities.

The session of the Board of Governors held immediately preceding the Mid-Year Meeting of the House authorized the appointment of a new Special Committee to study the matter of formulating model grievance and disciplinary procedures to the end that there may be uniform and effective enforcement of the standards of conduct prescribed by the Canons of Professional and Judicial Ethics. The creation of the new committee was prompted by numerous suggestions that the Association exert its leadership in an effort to achieve greater uniformity of procedure among the states in this field, recognized as a proper subject for state jurisdiction.

The House of Delegates referred to this new Special Committee on Disciplinary Procedures a further recommendation of the Commission on Organized Crime, as follows:

> RESOLVED, FURTHER, That the President of the American Bar Association be and hereby is directed to create a new committee whose duties shall be to survey the nature and extent of activities of members of the bar who foster organized crime either as public officials or as private practitioners, or who engage in other types of unethical practice, and to evaluate the adequacy of existing canons of ethics and grievance procedures for dealing with these individuals.

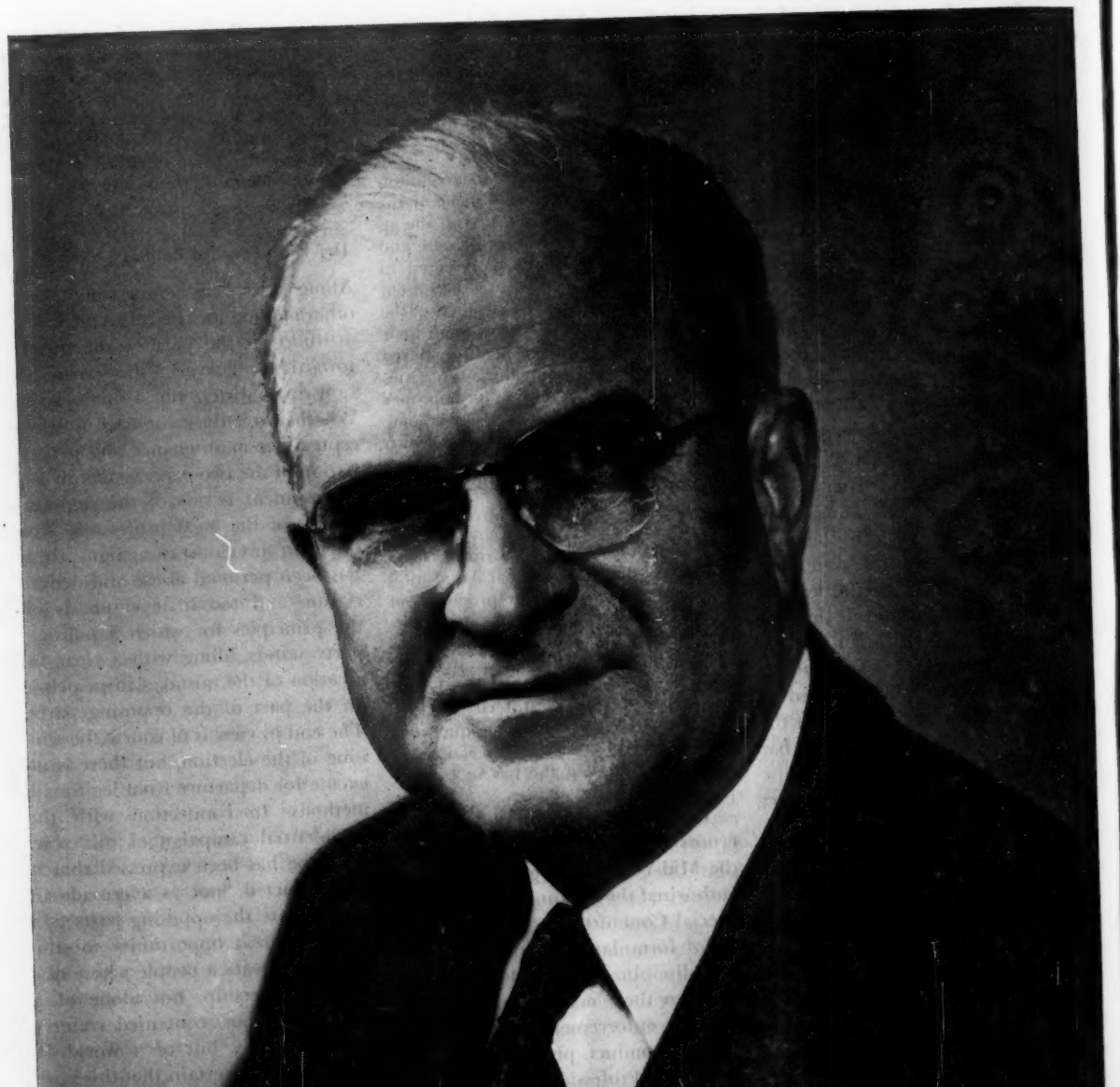
(b) High Level of Politics

Along with law enforcement, another method for creating a favorable attitude on the part of the public toward the lawyer is his participation in politics, on a high level. Whether openly recognized and accepted, the maintenance and perpetuation of the two-party system in our Government is one of the responsibilities of the legal profession. Too often in previous campaigns there has been personal abuse and denunciation and too little emphasis on the principles for which a political party stands, along with a clear indication of the mistakes in principle on the part of the opposing party. The end in view is of course the winning of the election, but there is no excuse for departure from legitimate methods. In connection with the Presidential campaign of this year, the hope has been expressed that it be conducted "not as a crusade to exterminate the opposing party . . . but as a great opportunity to educate and elevate a people whose destiny is leadership, not alone of a rich, prosperous, contented country as in the past, but of a world in ferment". I am certain that this position reflects the views of both political parties. The cause of popular government can be further advanced by the 1952 Presidential election than by any we have experienced in decades, and the lawyer can be of immeasurable help by participating in the contest and doing his part in conducting it on a high level.

(c) Our Program. Our Partner—The Press.

By raising the standards of legal education and admission to the Bar, by better policing of the ranks and enforcing ethical conduct, by im-

(Continued on page 885)



ROBERT GERALD STOREY
President, American Bar Association, 1952-1953

The New President of the Association:

Robert Gerald Storey

▪ A daydreaming young lawyer could scarcely hope for a career as colorful as that of Robert G. Storey, new President of the American Bar Association.

The 1952-53 leader of the Association is more than simply "President Storey". He is also Attorney Storey, Dean Storey, Colonel Storey, Doctor Storey and Business Executive Storey.

Mr. Storey and his career as lawyer, soldier, educator and businessman have been widely publicized. He is already a personal friend of many of the nation's lawyers, and thousands of others will get to know him during the coming year. But for those members of the American Bar Association who may not meet him, his career is sketched in this article to help you get acquainted.

Bob Storey, as he likes to be called, was born in 1893 at Greenville, Texas. He was the son of a doctor and planned from boyhood to study medicine at the University of Texas. His flair for oratory, however, turned him to the study of the law soon after he entered the university.

Young Robert G. Storey, Attorney, began his practice in 1914 at the tiny town of Troup in East Texas. He prospered and was Assistant County Attorney by 1917, when the United States entered World War I.

The war years were momentous for Bob Storey. He was married, joined the Army and became a first lieutenant in the Coast Artillery, although he failed to see combat.

After the Armistice, Lieutenant Storey again became Mr. Storey. He practiced law for three years at Tyler, Texas, and then was appointed Assistant Attorney General of Texas in charge of Criminal Appeals. He held the post two years before resigning to move to Dallas.

Bustling Dallas soon marked Robert Gerald Storey as one of its rising young men. By 1928 he was 35 and beginning to hit his stride. He already was a topnotch corporation lawyer and a regent of the University of Texas. He also joined the American Bar Association and promptly took part in many of its activities.

Since then Mr. Storey has been Chairman of the Section of Legal Education (1938-40); State Delegate from Texas (1937-42); Director of the Southwestern Regional Meeting in 1951; Chairman of the Committee on Veterans Affairs; Assembly Delegate; and Member of the Board of Governors. He was an official delegate to several meetings of the Inter-American and International Bar Associations and also was a member of the Council of the Inter-American Bar Association and the Council of the Survey of the Legal Profession. During this period he was active also in local bar association work, serving as President of the Dallas Bar Association in 1934 and as President of the State Bar of Texas, 1948-1949.

Mr. Storey journeyed to bomb-riddled England in 1941 as Chairman of the Civil Defense Committee of the American Bar Association. And he was there on December 7, 1941, when the United States was catapulted into World War II. He felt that he was needed in the Armed Forces, and in less than four months he was a major in the Army Air Corps.

Major Storey was determined to make up for his lack of action in World War I. He requested duty as a combat intelligence officer.

The request was granted and Major (later, Colonel) Storey saw action aplenty for the next four years. He flew on many secret combat missions over enemy territory and did yeoman's work in the Balkans, then occupied by the Russians. He was awarded the Bronze Star for collecting German Air Force material and information on Balkan war criminals.

Colonel Storey returned to the United States wise in the methods of Communists, whom he had observed at first hand. He was given charge of a Senior Officers Air Intelligence School at Orlando, Florida, where he was tapped in 1945 for one of the biggest tasks of his career.

Supreme Court Justice Robert H. Jackson, a long-time friend in bar association work, asked him to gather evidence against top Nazis. Bob Storey again became a civilian and went to Europe to start the momentous task.

The responsibility of collecting mountains of evidence later grew into the preparation of the United States' case. And finally, Mr. Storey was Justice Jackson's Executive Trial Counsel at the historic Nuremberg trials.

His work earned him the United States Medal of Freedom and the French Legion of Honor to go with his Bronze Star and a Legion of Merit he received earlier for combat intelligence service in the Mediterranean Theater.

Bob Storey was next asked to round up evidence on Japanese war criminals. He declined, feeling he should return to Dallas and his long-neglected law practice.

In 1947 he was urged to become Dean of the School of Law at Southern Methodist University. He first refused. But upon further urging, Mr. Storey agreed to become dean on a part-time basis if he could develop an outstanding Legal Center.

As Dean Storey he brought into existence the unique, $2,500,000

Southwestern Legal Center dedicated last year. He is President of the Southwestern Legal Foundation, which operates the Center in cooperation with the Southern Methodist University School of Law. His multitudinous activities in creating the Center did not cause him to relinquish his post as senior partner in the Dallas law firm of Storey, Armstrong and Steger.

His two sons, both combat pilots in World War II, are lawyers associted with him in his firm. His attractive wife also is intensely interested in law. She has served in many bar association activities and was President of the Dallas Lawyers' Wives Club.

Soft-spoken Bob Storey is a successful businessman. He is a director of the Southwestern Bell Telephone Company and three life insurance companies. He is also chairman of the board of the Lakewood State Bank in Dallas. Long active in civic work he has served as President of the Dallas Park Board and has served his community in many other capacities.

He was awarded an Honorary Doctor of Laws Degree by Texas Christian University. He was an Observer at the World Council of Churches meeting at Amsterdam in 1950 and continues to take an active part in church activities in Dallas.

Join all the previously mentioned activities with numerous civic and public positions of responsibility held by Mr. Storey and you have a brief picture of the new President of the American Bar Association. Few men have given more freely of their time and energy to the cause of justice and to the work of the organized Bar than has Bob Storey. It is indeed fitting that a man of this caliber should be elevated to the highest post in the organized Bar.

The Oath of a Lawyer: A Welcome to New Members of the Bar

by Lester P. Dodd • of the Michigan Bar (Detroit)

■ This was the address of welcome delivered by Mr. Dodd as President of the Michigan State Bar Association to more than 125 young lawyers when they were admitted to the Bar last January 8 at a ceremony in Detroit. The editors of the *Journal* felt that it deserved to be given wider currency. It was originally published in the February issue of the *Michigan State Bar Journal*.

■ May it please the court . . . with whose permission I address myself briefly to the new members of our profession:

In behalf of the Bar of the State of Michigan, I bid you welcome to your profession.

I welcome you to a profession, in the practice of which—in all probability—you will find neither wealth . . . nor fame . . . nor ease . . . nor leisure.

I extend to you a welcome to a profession, in the practice of which you will find yourselves obliged to discard much that you think you have learned, and to relearn much that you have discarded.

I bid you welcome to a profession in the practice of which you will find that your most valuable tools are not merely a knowledge of the law and the rules of practice, but honor and integrity, human compassion and understanding.

I welcome you to a profession to the practice of which you will be expected to bring the energy, the inquisitiveness, the idealism and optimism of youth, qualities to leaven the conservatism, the complacence, the lethargy, the materialism of an established order.

I welcome you to a profession in the practice of which you will undergo disappointment, drudgery, disillusionment, and frustration, and in which you will encounter greed and selfishness. In far greater proportion, however, you will find opportunities to enjoy the solid satisfaction that can come only to a lawyer from the rendering of service devoted to the real and honest administration of justice among men and men's causes.

I welcome you to a profession, in the practice of which you will sometimes feel that you are bound and circumscribed by archaic, outmoded and unrealistic rules and conventions. To some extent you will be justified in that feeling. To that justifiable extent it will be your obligation as members of the Bar to do something about it. It is to you and others of yours, and coming generations, that we must look for continuing progress in accomplishing the sole aim of the profession—the administration of justice.

I welcome you to a profession in which, idealistically, justice invariably prevails and the law remedies all wrongs. But at the same time I welcome you to a profession in which, realistically, the shadowy figure of justice is frequently difficult to identify. The law's remedy may prove to be more illusory than real, and may on occasion prove to be more deadly than the ill it seeks to correct.

In short, I welcome you to a human profession . . . the profession of the law.

I suggest some of these things, not to disillusion or discourage you, but with the hope that you will approach the practice of law with the realization that you are not simply inheriting a static and unchanging

(Continued on page 847)

The Work of the Practising Law Institute: A Lawyer's Education Never Stops

by **Arthur A. Ballantine** • of the New York Bar (New York City)

■ This article is a report prepared for the Survey of the Legal Profession.

The Survey has secured much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

Reports are released for publication in legal periodicals, law reviews, magazines and other media as soon as they have been approved by the Survey Council's Committee on Publications. Thus the information contained in Survey reports is given promptly to the Bar and to the public. Such publication also affords opportunities for criticisms, corrections and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

■ For almost twenty years the Practising Law Institute[1] has pioneered in postadmission education for lawyers. The Institute's work was largely expanded in 1943 when it conducted a national program for lawyers on income taxes under the sponsorship of the American Bar Association's Section of Taxation. With the end of the war, again with the sponsorship of the Association, P.L.I. undertook a national program of refresher courses for lawyer war veterans, this being carried on from 1946 to 1948. Lecture courses were given in about fifty cities. Since 1948, the national program has been carried on by the American Law Institute in collaboration with the American Bar Association. P.L.I., relieved of this responsibility has devoted its energies mainly to improving and enlarging its New York courses.

During 1951 more than 10,000 lawyers were served by P.L.I. through evening lecture courses, Saturday forums, summer sessions, home study programs or monographs published by the Institute.

Evening classes in New York City were attended by a total of 1,854 lawyers. The summer session, given during three weeks in July, was attended by 588 lawyers including attendants from thirty-seven states. During the year five Saturday forums were given. The forums had an aggregate attendance of over 3500. In addition, more than 3000 lawyers were enrolled in the Institute's Home Study Program. P.L.I. also conducts review courses for the New York Bar Examination, with an annual attendance of about 1400. More than 100,000 copies of our monographs were printed during the year. More than 200 lawyers participated in our programs as lecturers.

Saturday Forum Is New Development

Perhaps the most interesting new development in our work is the Saturday forum. As an example, a recent forum, one on estate planning, had an attendance of over 700 lawyers. Attendants came from eighteen states in addition to New York. A panel of twelve specialists presented in detailed round-table discussion the methods they employ in working out four typical estate-planning problems, ranging from the simple case of the family whose chief source of income is a salary and whose principal asset is life insurance to the planning of a large estate involving the use of *inter vivos* trusts and gifts, powers of appointment, charitable foundations, the marital deduction and the continuation of a business. The program began at 9:30 A.M., included a group luncheon served in the hotel and ended at 5 P.M. The discussion was on an advanced level designed to meet the needs of mature lawyers with some experience in this field.

The Saturday forums deal primarily with problems of important current interest, differing viewpoints being presented by panel discussion. Government lawyers frequently appear together with counsel for industry. Questions submitted in advance are discussed at the luncheon meeting and during a question-and-answer period. Wherever possible the discussions center around the lawyer's work in dealing with a typ-

1. Articles concerning the Practising Law Institute's earlier activities have appeared in the following issues of this *Journal*: 24:231 (1936); 26:200, 402 (1938); 29:516 (1943); 31:461 (1945); 33:634 (1947).

ical problem. Forum topics have included the marital deduction, the Revenue Act of 1951, tax planning for corporations, taxation of executive incentive plans, antitrust laws, medical proof, corporate readjustments, defense contracts, and wage and salary stabilization.

A more detailed and more leisurely consideration of estate planning is included in the Institute's summer session, held each year during July. Then a full week's program (from 9 A.M. to 4:30 P.M. for five days) is devoted to this subject. Other subjects in which a one-week program is included in the summer session are taxation, corporate practice, patents, trial technique, and medical aspects of litigation.

Both the Saturday forums and the summer session programs grow out of the Institute's evening classes which are given from September until June each year. In these evening classes instruction is given in every major field of practice.

P. L. I. Courses Deal With All Phases of Lawyer's Work

The basic purpose of the P.L.I. courses and publications is to provide easily comprehended instruction in every aspect of the lawyer's work in dealing with typical matters. We seek to improve the lawyer's professional skill and to furnish an understanding of the economic and business background out of which typical transactions arise. Thus the Institute's instruction takes up practical aspects of the lawyer's work not dealt with at all in most law schools. The law school approach tends to focus attention on the rules of law and the reasons for the rules; P.L.I. seeks to teach professional procedures such as methods of collecting and analyzing facts and utilizing them appropriately; methods of solving typical problems, including the tax aspects which are so important today. The Institute's point of view is reflected in the following, culled from the suggestions which each of its lecturers receives:

> Concentrate on those problems which arise most frequently in your field. Omit rare and unusual cases. Explain such practical matters as strategy and tactics, typical procedures, considerations of policy in selecting a course of action and conducting negotiations.

While P.L.I. continues to stress training for recent law school graduates, designed to bridge the gap between law school and law practice, the majority of those currently attending the Institute's programs have been in practice for some time. Some have even had as much as thirty years' experience at the Bar. Older lawyers attend in order to keep pace with the development in new fields of practice as well as to keep up-to-date in their own specialities.

The Institute recently has included in its programs courses on nonlegal subjects of importance to lawyers. Courses on investments, accounting, psychiatry and public speaking have been well attended. A Saturday forum on the "Problem of Russia" attracted a large audience of thoughtful lawyers, some of whom brought interested clients with them.

The instructional methods employed in the Institute's programs are varied. Most teaching is by informal lecture, without recitations and with class discussions and questions reserved for the end of the two-hour period. In courses on trial work, extensive use is made of demonstrations and panel discussions.

Many law firms encourage attendance at P.L.I. programs through the firm's paying the tuition fees for members of its staff. To facilitate this, the Institute has a firm membership plan, under which 127 law firms, a number of whom are distant from New York, contribute annually to the Institute and receive copies of all Institute publications, including about five hundred pages a year of mimeographed citation sheets and lecture outlines. A similar membership plan is also available to individual practitioners.

As part of this professional instruction, the Institute publishes seventy monographs totaling over 4000 pages, including those on general practice, trial practice, fundamentals of federal taxation and current problems in federal taxation. A total of over 1,000,000 P.L.I. pocket books have been used by lawyers throughout the country. The monographs are revised frequently, to keep them up-to-date. New subjects are added as needed, such as "Tax Aspects of Executives' Compensation", "The Excess Profits Tax" and "The National Labor Relations Act and Managements' Objectives in Collective Bargaining", issued in recent months.

The most popular monograph is "Estate Planning" by Joseph Trachtman of the New York Bar. Through many revisions this monograph has grown from seventy-five to almost 200 pages. Although "Estate Planning" could now command a price of $5 or more, in line with other law books, the original price of $2 has been retained, reflecting the nonprofit aspect of the Institute.

Institute Also Offers Correspondence Courses

Some lawyers unable to attend the Institute's lectures enroll in its correspondence courses on general practice, trial practice, fundamentals of federal taxation and current problems in federal taxation. These were developed at the request of the American Bar Association. Enrollees receive the monographs and syllabi for study and solve typical practical problems. Their solutions are reviewed by lawyers on the Institute's staff and returned with answer-explanation sheets. Over 125,000 assignments have been reviewed in the five years since the home study program began.

The Institute also conducts review courses for the New York State Bar Examination. These are very popular, particularly with graduates of law schools in other states seeking greater familiarity with the New York rules.

The Institute's board of twenty-five trustees during the past year was headed by the late Robert P. Patterson, formerly Secretary of War and United States Circuit Judge, and includes United States Circuit Judges Charles E. Clark and Harold R. Medina; New York Appellate Division Justice Bernard L. Shientag,

Arthur A. Ballantine, a member of the New York Bar practicing in New York City, was Under Secretary of the Treasury in 1932-1933. He has had considerable experience in the field of taxation, and served as Solicitor of Internal Revenue. A former president of the Practising Law Institute, he has been a member of the Association since 1911.

Dean Young B. Smith of Columbia Law School, and other leading members of the Bar. The Practising Law Institute's office is at 57 William Street, New York 5, New York.

Harold P. Seligson, The Institute's founder and guiding spirit, continues as its Director, assisted by a staff of experienced practitioners, including Edward Iskiyan, George H. Behrens and Joseph A. Starr.

The Institute was chartered in 1938 as a nonprofit educational corporation by the New York State Education Department, following recommendations of committees of The Association of the Bar of the City of New York which had studied Harold Seligson's pioneering work. Leaders of the Bar who served on these committees became the Institute's first trustees. In 1946 when the national refresher program was undertaken the Institute received a grant of $50,000 from the Carnegie Corporation of New York and contributions totaling about the same amount from the Bar. These funds enabled the Institute to publish its materials and make its services available on a national basis.

The success of the Institute is due to its approach, and the increasing realization by the Bar of the value of such supplemental professional training. Much remains to be done in the field. Despite the work of the Institute, the Committee on Continuing Legal Education of the American Law Institute, which collaborates with the Association in conducting programs on a national basis and of organizations like the Southwestern Law Institute of Texas lawyers seem to be still far behind doctors in continuing professional study. This may well be why the income of the average lawyer is reported to have fallen to at least 75 per cent of that of the average doctor.[2] Doctors, after graduation from medical school, receive supervised experience through internships, residencies, hospital staff meetings, hospital postgraduate courses, monthly educational programs conducted by regional medical societies, and national and state educational meetings often of several days' duration and attended by thousands of doctors.

As the law becomes more complex and lawyers are called upon to play an increasing role in solving society's problems continuing education becomes more and more important. The steadily increasing attendance by lawyers at programs such as those conducted by P.L.I. reflects the recognition by the Bar that a competent lawyer studies all his life.[3] Education never stops.

2. "Economic Inventory of the Legal Profession—Lawyers Can Take Lesson from Doctors", address of Arch M. Cantrall, President, at the Annual Meeting of the West Virginia State Bar, October 12, 1951, published at 38 *A.B.A.J.* 196, March, 1952.

3. See the concluding chapter in Harry A. Overstreet's *The Mature Mind.*

"Twelve Good Men and True"

(Continued from page 816)

mind. No juror should ever vote against his conscience. He should vote according to his honest judgment. If everyone is fair and reasonable, a jury can almost always agree. If a jury cannot agree within a reasonable time, it generally means a new trial, which is a great expense to the parties and the Government, so jurors are expected to be fair, reasonable and courteous to each other, and try to reach an agreement which is a "true verdict".

The substance for the following paragraph was taken from one of Judge Knox's instructions:

> Jurors should never forget they will make a definite contribution to efficient judicial administration if they arrive at a just and proper verdict in a case. In closing I remind you that in your deliberations in the jury room there can be no triumph except the ascertainment and declaration by your verdict of the truth.

It is too soon to measure the reaction of the Bar to an instruction booklet of this character, or the effect it may have on jury trials. No subject now offers a better opportunity for the Bar to improve the administration of justice, in my opinion. Great progress has been made in other fields of our profession. The criticism and prejudice against the profession among laymen stems from ignorance. The more enlightenment we can give the layman when he comes into court, the greater will be his pride in our courts and his confidence that the administration of justice, under the law, is the sole purpose of courts and their only justification to continuance.

Why I Will Study Law:

A Freshman Law Student Looks Ahead

by Gerald E. Matzke

■ Mr. Matzke is one of twenty young men who entered New York University School of Law this autumn under the newly established Root-Tilden Scholarships, the grant of an anonymous donor who sees the importance to the nation of securing outstanding young men of sterling character and real ability as public leaders trained in the law. Mr. Matzke's article, published here, is the essay he was required to submit as an applicant for one of the scholarships.

■ A young man, born at the beginning of a drouth and depression, reared during the threat and waging of World War II and reaching the age of 21 in a period of conflicting values and disintegrating peace, must look deep to basic principles or give way to the apparent confusion and frustration which seems to prevail in all fields of human activity in our present day.

His alternatives are to drift with the masses in what George Bernard Shaw termed the most miserable of human occupations—the pursuit of happiness—or he must plan, fight, study and work many times harder than he would be required to in normal times to create something of significance.

He can, in mapping a worthwhile life, find consolation in the fact that the most useful ideas and achievements by which civilization has forged ahead have been conceived in times of greatest challenge and conflict. When conditions produce such painful instability and mental anguish that it seems almost impossible to do anything other than surrender to the miserable peace of inaction, it is then that only a few continue to grasp for truth and rationality.

Youth today is challenged as never before with problems of human and divine relationships—of basic values—and of translating them into workable, down-to-earth, principles and rules for the acceptance and guidance of peoples everywhere.

My college education in the fields of the basic sciences, government, history, philosophy and literature has been one of gaining understanding and mental development rather than of memorizing facts. The commonplace idea of striving for personal security has given way before the urgent demand of helping in some small way to create a world security in which stability of the affairs of individuals can be possible.

GERALD E. MATZKE

Having arrived at the beginning of my adult life with all the idealism, courage and drive that is the heritage of youth, I see the obvious need for an effective tool to utilize this willingness to work twenty hours a day for that which will contribute

(Continued on page 874)

The following is Gerald Matzke's letter offering this essay to the Journal:

For many years I have read my father's copy of the *American Bar Association Journal* in my leisure between activities of necessity and my studies at the University of Nebraska. In the March, 1951, issue there appeared an article entitled "The Root-Tilden Scholarships: A Unique Experiment in Legal Education". The ultimate result has altered my life greatly. For in September I will enter the Law Center of the New York University School of Law as a Root-Tilden Scholar.

On paging through the June issue I noted and read a most enlightening article entitled "Why the Law Is Fascinating: One Lawyer's Philosophy About His Profession", by Peter H. Holme. This "non-practical" article has prompted my submitting the enclosed essay for consideration for publication.

All applicants for a Root-Tilden Scholarship are required, along with the usual formalities, to submit an essay setting forth their ideas on a professional career. Enclosed is a copy of the essay I wrote. In comparison with Mr. Holme's article it shows the view of a youth—perhaps of interest to some.

In my college years I have served as regional director and member of the Board of Directors of the Collegiate Council for the United Nations, and as president of the Nebraska University Council for World Affairs. . . .

Books for Lawyers

THE DIARY OF GEORGE TEMPLETON STRONG. *Edited by Allan Nevins and Milton Halsey Thomas. New York: The Macmillan Company. 1952. Four Volumes. $35.00.*

A diary containing more than four million words sedulously written by a New York lawyer, and now published in four weighty volumes, offers something of a challenge even to those whose literary preference is biography. It may nevertheless be asserted with confidence that a careful reader of this work will always thereafter associate it with the great diaries of history. It is the self-disclosure of a most remarkable man and it presents an unforgettable picture of New York life in the middle of the nineteenth century. Messrs. Nevins and Thomas have placed the reading public in their debt by exercising editorial talent of a high order. They have omitted such portions of the Diary as seemed of little or no consequence. They have so divided and annotated the remaining mass of material as to make it more readable. The day-by-day entries appear in chapter-like divisions, each of which covers a year. Each chapter is introduced by an editorial paragraph summarizing its contents. A reader seeking a bird's-eye view of the Diary as a whole might readily gain such a picture by reading these headnotes consecutively. Professor Nevins has supplied an illuminating and most interesting prefatory essay descriptive of "The Man and the Diarist".

George Templeton Strong was born in 1820. At the age of 15, when about to begin his sophomore year at Columbia, he determined to keep a diary. He lost no time in translating his resolution into action. He procured a "sizable blank book" and made his first entry under date of October 5, 1835. Some forty years later on June 25, 1875, he made the last entry and died within a month.

In aid of an attempt to visualize the problem of the editors this reviewer has examined a photographic reproduction of a typical page of Strong's manuscript. This appears as an "insert" in Henry W. Taft's history of the successive law firms of which the first was Strong and Wells, formed in 1818; the latest being the present firm of Cadwalader, Wickersham and Taft. The page (not counting margins) is 7 inches by 13 inches and is neatly written in characters so small that a reader with average eyesight needs the aid of a magnifying glass in deciphering it. This particular page happens to include a reference to a reception at the Fifth Avenue Hotel in 1865, at which General and Mrs. Grant were the guests of honor. The Strongs attended because Mrs. Strong had promised to stand beside Mrs. Grant during the ceremony "of which that simple western lady stood in great awe".

The first volume covers the years from 1835 to 1849 and is entitled "Young Man in New York". The second (1850 to 1859) is captioned "The Turbulent Fifties". The third (1860 to 1865) is devoted to "The Civil War". The fourth (1865 to 1875) is entitled "Post War Years". Each volume is prefaced by a list of "Dramatis Personae"—a sort of "Who's Who" for the pages that follow.

The Diary is a record of daily doings, of current events on both local and national levels and of exceedingly frank estimates of contemporaries in every walk of life. The experiences of a college boy, the work of a busy lawyer, the activities of a man of wide cultural interests, the war-time service of a patriot, the evolution of deep and abiding religious convictions, the home life of a devoted husband—all these phases of the diarist's personality are recorded with a freshness and spontaneity which captures and holds the interest of the reader. "The diary" says Professor Nevins, "was plainly written for posterity, and the author justly regarded it—hurried though many entries had to be—as one of his public services. The reader who follows this great record from 1835 to 1875 will find himself magically transported back to a by-gone republic and a by-gone era, to witness a dramatic march of events, and to study a sweeping panorama of social and political change; and he will find that his guide in this adventure is one of the most cultivated, sincere, intelligent, high-minded, and delightful gentlemen that New York ever produced."

This reviewer was at first perplexed by the persistence of the diarist's early tendency to ridicule and even to excoriate everybody with whom he did not happen to agree. While in his later years he became slightly more mellow, it nevertheless seemed strange that a somewhat sophomoric state of mind should endure for a lifetime. Perhaps an explanation is to be found in what appears to be the fact—that Strong while at the Bar spent relatively little of his time in court. The lawyer constantly engaged in the battles of the forum is apt to become more tolerant of differences of opinion and to be less cocksure in his judgments. The "office lawyer", on the other hand, more closely resembles the man of purely academic experience, to whom it seldom occurs that one who differs from him may after all be right. An analogy is found in the case of writers of book reviews. The man of purely professorial type when writing a book review is prone to discredit an author with whom he disagrees by "smearing him" with an odious comparison or by adopting some

similar Macaulay-like device. Such a characteristic may unfit a man to be a reviewer but it serves to make a diary all the more readable, inasmuch as self-revelation rather than self-discipline is the all-important quality in a literary production of this sort.

Strong served a three-year apprenticeship in the office of his father's firm, Strong and Bidwell. In 1841 he was admitted to practice as a solicitor. "Such a farce of an examination" he observed "such an asinine set of candidates, and such prodigiously uncomfortable timber benches, I never met with before." In 1844 he was admitted to practice in the higher courts as a counselor-at-law. In the very next year he was made a partner in his father's firm. The firm style was changed to Bidwell and Strong, in recognition of Mr. Bidwell's seniority, but upon the admission in 1856 of Charles E. Strong, a cousin of the diarist, it became Strong, Bidwell and Strong. The son thereafter remained a partner for about seventeen years and then withdrew in order to accept appointment as Comptroller of Trinity Corporation, the organization which administered the fiscal affairs of Trinity Parish.

In this review, intended for publication in the AMERICAN BAR ASSOCIATION JOURNAL, major emphasis is placed on the legal aspects of Strong's career as disclosed in the Diary. In this connection it is hard to escape the conclusion that he was never really in love with his profession. He came to the Bar with a fair measure of enthusiasm but during his thirty years of practice this seems to have waned. This process, however, merely adds interest to the record. Many practitioners, as they read it, will recognize Strong's experiences as akin to their own. Indeed when one considers the range and intensity of his extraprofessional interests as reflected in the Diary it becomes evident that the law had to struggle with many competing interests to retain its place in his life. His devotion to his parish church was in no sense perfunctory. As vestryman and warden he performed his duties with intelligent enthusiasm and finally was led to retire from practice in order to place his whole time at the disposal of his parish. As a trustee of Columbia he gave a vast amount of effort to the development not merely of the Law School but of the University as a whole. His contempt for his conservative colleagues may be inferred from his restrained comment on their "Boeotian fogyism, the abyss of inert, stolid, obstructive, obstinate, mulish, wilful stupidity." During the Civil War his work for the Sanitary Commission was prodigious and "his diary broadened into a stirring national record". A reader with musical tastes will be interested in the abundant evidences of Strong's enthusiasm for music and entertained by his discriminating comments upon composers and musicians. The editors of the Diary comment upon what is really a storehouse of material bearing upon this phase of the cultural life of New York—material which will doubtless some day be utilized by a writer in this special field. For the purposes of this review a single characteristic comment must suffice. "February 2 (1852) Heard *Don Giovanni*. House crowded, but cold and interested in nothing, unless perhaps by some of Zerlina's irresistible music. It would be strange if a miscellaneous mob of operatic New Yorkers should appreciate Mozart. They have taken it for granted that Verdi's sustaining unisons and Donizetti's stilted commonplaces of languid sentiment are good, and *Don Giovanni* must, therefore, be to them something far from good. I should as soon expect people whose reading has been chiefly in Eugene Sue to become excited over the *Vicar of Wakefield*."

Not the least interesting aspect of the Diary is the light which it throws upon Strong's educational development and upon his lifelong absorption in educational problems. His early training in Latin and Greek stimulated an enthusiasm for the classics which persisted throughout his life. The style in which the Diary is written gives ample evidence of classical influences. "It is safe to say" observes Professor Nevins "that few such detailed records of the development of a lad from fifteen to eighteen have ever been kept as that which Strong faithfully set down". The later stages of the record are in this respect equally remarkable. The reader turns page after page, intending perhaps to lay the book aside, and soon finds himself unable to do so. Such is the result of the complete but unstudied self-disclosure of a man of active and honest mind, of great quickness of apprehension, of wide cultural and civic interests and an acquired capacity to express himself with clarity and force.

The reader of the Diary will soon learn to admire Strong for his admirable qualities and to develop something like affection for one so patently honest and so capable of deep feeling. His life-long devotion to his charming wife and their several children supplies an additional attraction. The fact that the Diary has for half a century been withheld from publication takes the sting from most of Strong's caustic comments upon individuals now dead. It is not an overstatement to say that the study of the Diary will prove to be an educational experience of great value and that the human interest which it arouses will be ample compensation for a considerable expenditure of time. Well-selected and admirably reproduced illustrations add interest to each of the four volumes. The photographs of Strong himself make it possible to trace the evolution from brilliant and supercilious youth to a maturity in which charm survives and superciliousness has disappeared.

GEORGE WHARTON PEPPER
Philadelphia, Pennsylvania

LAW: THE SCIENCE OF INEFFICIENCY. *By William Seagle. New York: The Macmillan Company. 1952. $3.50. Pages 167.*

The lawyer reader of this book will find a chuckle, although quite possibly an unwilling one, on almost

every page. The more outrageous he considers a particular generalization to be, the more aptly turned is he likely to find its phrasing. It is a book which never bores, continues to provoke, and is guaranteed to furnish a thoughtful and entertaining evening. Essentially, however, it is a book which sells the law short. It preaches a gospel of frustration and defeat.

The theme runs roughly as follows:

Law is the science of inefficiency due to the interplay of a number of factors. Included among them are the confusion of objectives, the problems of semantics, the essentially timid character of judges, the ordeals of procedure and the basically bogus nature of the war on crime. As for the objectives, Stability competes with Change, Liberty must be reconciled with Authority, the rights of the Individual must dovetail into the rights of the State, the rights of Persons must be co-ordinated with the rights of Property, and Law must be squared with the overriding concept of Justice. Words are the tools of the law and carry with them in most acute form all the hazards of meaning and communication. Judges are timid souls, content to sit as umpires and to decide as little as possible. Procedure continues to be the basic mode of preventing the realization of substantive rights. The enforcement of the criminal law clashes with liberty, and so the war on crime is ever a phony one, with violations of constitutional guarantees now substituting for misspelled indictments as grounds for reversing convictions.

To make a gloomy picture gloomier, reform generally consists merely of an exchange of evils. Thus in the procedural field, removal of the ancient disqualification of parties as witnesses raised the tide of perjury, the development of discovery procedures has substituted documentation and expense for surprise, and summary judgment eliminates false issues of fact at the price of restoring trial by affidavit.

At this point the despairing reader is likely to put the question: How have the law and lawyers, even organized society itself, survived these dreadful circumstances? The author supplies the answer by shifting basic assumptions, although the gears clash somewhat during the shift. After assuming throughout, although not expressly saying so, that it would be a happy circumstance if the law were efficient, he now says that the importance of law as a social force has been much exaggerated, and hence the whole matter is of slight consequence in any event. The law "has never displaced its old competitors, custom, religion, and ethics. . . . As society has come to live in any realistic sense more and more without law, it is idle to wonder about the effects of law upon its activities."

Now all this is discouraging doctrine for those who have an interest in the law and harbor an affection for its practitioners. Perhaps some measure of consolation can be found by turning away from Mr. Seagle's autopsy over what he obviously regards as a dead horse to some diagnosis of our own.

The fullness of Mr. Seagle's disillusionment seems to arise from the failure of the law to be scientific. In the text of *Law: The Science of Inefficiency,* the terms law and efficiency are both defined. Law is "a mode of regulating human conduct through forceful sanctions imposed by politically organized society". And efficiency as applied to law "means only that the law will do what it can as expeditiously as possible". Nowhere, however, does any definition of science appear, and hence the author's notion of the nature of science must be arrived at by inference. The most likely material for the drawing of the inference appears in connection with the scolding administered to the courts for being unscientific in failing to accept fully such techniques as the lie detector, the drunkometer and blood-grouping tests. Actually such items have little to do with scientific method. They are merely areas in which knowledge seemingly has been pushed back a little bit, of which courts might take fuller advantage, but which suggest no very basic alterations in approaches to the solutions of judicial problems. The impatient might do well to recall the extent of the recognition recorded phrenology, fortunately not in judicial circles, not so long ago.

Confusion between laboratory techniques and scientific method must tend to obscure the problem of the unscientific character of the law. The reason why the law is unscientific is that it has never engaged in any systematic observation. Such rules as those which govern the admissibility of evidence have been derived from haphazard observation, anecdote and speculations about how human beings behave. The provisional character of theories in the scientific world results in their being discarded if unsupported by empirical data. The law never collects any empirical data, hence theories are discarded only when very obviously out of step with current thinking in other areas.

When an institution as a whole gets too much out of step with current thinking in other areas, it is unlikely to win public acceptance. This is, of course, the age of science, and it is not surprising to encounter reluctance to accept problem solutions based on techniques carried over from the age of reason. However, the problems are there to be solved, and available methods must be applied to their solutions. Those who condemn the law for being out of step with the times ought to remember the manner in which the growth of one science must often await the development of another upon which to build. The field of the law is human behavior. Anthropology, psychology, sociology and economics are rapidly assuming the stature of sciences. They will furnish the foundations upon which ultimately the law will begin to build anew. Meanwhile, an awareness of the materials which are going into these foundations seems more appropriate than an attitude of disillusioned frustration.

EDWARD W. CLEARY

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GAMBLING: SHOULD IT BE LEGALIZED? *By Virgil W. Peterson. Publication Number 98, American Lectures in Public Protection. Springfield, Illinois: Charles C. Thomas, Publisher. 1951. $2.75. Pages 158.*

This book should appeal to a wide variety of readers. It will delight those who enjoy an occasional insight into the darker corners of the underworld; it will be well received by all who appreciate unusual glimpses of early Americana, such as those which came with the Mississippi riverboats; and it will strongly appeal to any citizen who recognizes gambling as a social problem which must be faced with courage and intelligence.

At the outset Mr. Peterson sounds an admirable keynote: "Unfortunately there has been too much discussion, both favorable and unfavorable, of the proposal to legalize gambling that is based on emotion rather than logic, on theoretical concepts rather than an analysis of well established facts, and on moral issues rather than the social implication involved." Having thus launched his study the author states as its sole purpose the objective examination of various proposals to legalize gambling. Mr. Peterson assures his reader that he is not at all concerned with the moral aspects of the question, nor with the private conduct of individuals who gamble, but rather merely with the benefits and detriments of legalized wagering.

To this intriguing survey the author brings an excellent set of qualifications. Professor Fred E. Inbau, of the School of Law, Northwestern University, introduces us to Mr. Peterson in the preface as a well-trained lawyer with twelve years' experience with the F.B.I. and eight years' service as Operating Director of the Chicago Crime Commission. This latter group is a nonpartisan, nonpolitical organization of Chicago business and professional men which serves as a "watchdog of crime" in Chicago, and as its Director, Mr. Peterson has amassed many facts and conclusions helpful to any reader who is concerned with gambling in any form.

In his early chapters the author traces the fascinating, but sordid, history of the gambling business in the United States. Using a very readable style Mr. Peterson tells the story of gambling from the days of the Mississippi riverboats to its interrelation with Tammany Hall. He seems equally at ease whether discussing the gambling fraternity of Kansas City, Council Bluffs or Pueblo, Colorado, and does not hesitate to use names, dates and places to enrich his presentation. The author also exposes the fraudulent devices and articles of gambling equipment which seem to have wide appeal to certain operators who assist in raising already favorable house odds. Nor is Mr. Peterson's survey limited to any one type of wagering, for he explores the whole gamut of gaming from dog racing to the college athletic "fix".

Because of his position with the Chicago Crime Commission the author is able to present an exciting and detailed chapter entitled "Highlights of Chicago's Gambling History". Though not entirely essential to his basic inquiry this excursion is well worth chronicling from a standpoint of interest, and may be viewed as a case study of what has undoubtedly happened in cities throughout the land. It should be noted, however, that this chapter will not be enjoyed by any who abhor violence, for the story of gambling in Chicago seems to have been written in terrorism and played against a backdrop of corruption, with most of the principal characters coming to an early and violent end.

From his survey of gambling in Chicago and elsewhere, Mr. Peterson concludes that it "has been the backbone of organized crime in America and an integral part of corrupt political machines that have ruled cities and states and have exerted a tremendous influence on national affairs as well". The author thus finds that wherever he has encountered illegal gambling he has also detected its two main undesirable by-products: gangsterism and corrupt politics.

After his analysis of illegal wagering, Mr. Peterson considers the "History of Legalized Gambling in the United States". In this, his longest chapter, the author traces results of various experiments in legalized gaming. He particularly dwells upon the history of the lottery and its near relative, the policy operation. He develops with great care the origins and functioning of legalized gambling in Nevada. In this latter survey the reader is again impressed with the wide use of names and other factual data which augment the text. Then Mr. Peterson looks to jurisdictions other than Nevada, and most readers will, I believe, be surprised at the wide variety of legalized gambling which is permitted in many of the so-called "closed" areas. The gamut runs from beano to slot machines and seems to bring with it in the main, many of the same problems found where illegal gaming is countenanced.

From his opening chapter there is no doubt as to how Mr. Peterson feels on the proposal of legalized gambling. He is squarely against it and his reasons are simple. He finds as its staunchest advocates the very persons who are now engaging in illegal operations and thinks it unlikely that they would be so enthusiastic if a cloak of legality were going to reduce or injure gambling. Then too the author observes that most proposals to license gambling place the administration of the plan in the hands of the same political officials and enforcement agencies which have shown themselves entirely impotent in controlling widespread violation of existing laws. Mr. Peterson argues, and does so with persuasion, that to legalize gambling is to increase its over-all size, and that "since gambling is a well-recognized source of crime, it is obvious that legalization would seriously aggravate the over-all crime problem".

The reader will not always agree with the author's basic premises and some may even find fault with his ultimate conclusion: "There is no

place for legalized gambling in an enlightened society." However, any citizen who recognizes widespread wagering as a genuine social problem will find this volume stimulating and worthwhile.

LOYD WRIGHT
Los Angeles, California

CRIME AND CORRECTION. *By Sheldon Glueck. Cambridge, Massachusetts: Addison-Wesley Press. 1952. $3.50. Pages 288.*

In this book, Professor Glueck has gathered together eleven papers he had contributed to various professional journals over the past twenty-five years. Despite the wide range of topics and the differences in time between the first appearance of these papers, there is a notable unity of philosophy and a continuity of theoretical development which provides a very tangible pattern of organization for the book. In fact, the subject matter covered by these papers, starting with an analysis of the various approaches to the problem of crime causation; several articles on the intricacies of the administration of criminal justice; two very provocative discussions of psychiatry and the criminal law; peno-correctional treatment; crime prevention; and finally a most lucid presentation of the "Nuernberg trials and aggressive war" as a criminal violation of international law; reflect the scholarly versatility of an eminent lawyer and teacher.

Even of greater significance, perhaps, is the fact that the contributions of Sheldon, and of his wife, Eleanor Glueck, lie in that area of legal theory and practice in which psychiatry, medicine, statistics, the behavioral and the social sciences are helping to create a more eclectic but certainly a more dynamic and more relevant concept of criminal justice. Many of the papers reprinted in this book represent Professor Glueck's pioneering efforts in this direction. Thus, the paper entitled "The Principles of a Rational Penal Code", first published in 1928, analyzes the vexing problems of policy and law which would have to be considered in the differentiation of the sentence-imposing feature of court proceedings from the guilt-finding phase. The principle expressed by Professor Glueck is that "The legal and institutional processes for the protection of society must be based not so much on the gravity of the particular act for which an offender happens to be tried as upon his personality—that is upon his dangerousness, his personal assets, and his response to peno-correctional treatment." In this connection, he raises the question of the establishment of a treatment tribunal and the difficulties in determining the scope of its jurisdiction. It was this recognition for the need of what Professor Glueck called "a fundamental redesign of the entire organization of criminal justice from top to bottom" that helped develop and define the adult and youth authority concept.

The article on "Psychiatry and the Criminal Law", also first published in 1928, is still a very pertinent discussion. In spite of the legal and psychiatric fallacies which permeate the McNaughton rules, they determine even today too many court actions and judicial decisions. Professor Glueck may have been a little too optimistic in 1928 when he wrote that "It may be confidently predicted that psychiatry and the sister sciences . . . will be even more called upon by the law and its administration to deal with problems of mental hygiene and therapy presented by the general run of delinquents and criminals."

For the criminologist, as well as the lawyer, the papers on the "Causes and Conditions of Crime" and the "Future of American Penology" are equally pertinent. In the search for the causes of crime, Professor Glueck takes to task those who have simple solutions and ready answers and insists that more discriminative judicial sentencing practices must be effectively combined with more scientific knowledge of the effects of peno-correctional treatment.

In the introduction to this collection of papers, Professor Glueck says: "Were it not a fact that the issues they deal with are still vital, I should not have assented to their publication as a book at this time. There can be little doubt that few acceptable solutions for the legal, social, and psychiatric problems raised have as yet been developed." We fully agree and so are indebted to Professor Glueck for having made these scattered papers so readily available.

JAMES V. BENNETT
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Washington, D. C.

KERLY ON TRADE-MARKS (SEVENTH EDITION). *By R. G. Lloyd and F. E. Bray. London: Sweet and Maxwell Limited. 1951. Pages 1053.*

The adoption of the Trade-Marks Act in 1938 introduced into the British statutory law a number of significant changes which were of interest not only to trade-mark owners and counselors in the United Kingdom, but to American trade-mark owners and lawyers as well. Until publication of this seventh edition of Sir Duncan Kerly's work, no presentation of the far-reaching effects of the Act had come to this reviewer's attention.

Shortly after passage of the Trade-Marks Act of 1938 the late F. E. Bray, K. C., commenced the task of revising the Kerly work. The war intervened and work on the revision was suspended. In 1946 he invited Mr. Lloyd to collaborate with him and the text was substantially completed at the time of Mr. Bray's death in 1950.

This seventh edition has innumerable qualities which recommend it. The Trade-Marks Act of 1938 was a highly complicated piece of legislation filled with cross-references, provisos and exceptions but Messrs. Lloyd and Bray have untangled it and present to the members of the Bar a lucid, well-organized, well-documented and adequately indexed reference book.

The major concepts which were introduced by the Act of 1938 were

(1) a new and broadened definition of a trade-mark; (2) provision for permitting the use of a trade-mark by a trader other than the owner of the mark; (3) allowance for the assignment of a trade-mark with or without good will; (4) provision for "defensive registration" of trade-marks which consist of invented or coined words in the absence of use on the goods for which registration is sought; and (5) modification of the rules which had formerly been applied to "passing-off" actions and permitting wider latitude for granting relief.

The format of the earlier editions has generally been adhered to in so far as the main structure of the various chapters is concerned. Substantial rearrangements have been made in order to avoid the repetition and diffuseness which were apparent in the previous editions. Almost all the sixth edition has been retained in the volume with the result that it offers complete historical treatment of the development of trade-mark law in the United Kingdom.

In addition to the discussions of trade-marks and trade names, the book includes a chapter on "Trade Secrets", one on "Trade Libel" and one on the "Merchandise Marks Acts and Warranty of Trade-Marks and Trade Descriptions".

The text itself is contained in the first 727 pages of the book and the appendices and index comprise the remaining 323 pages. These various appendices set forth in full the Trade-Marks Act of 1938, the Trade-Mark Rules of 1938, together with forms, the Paris Convention as amended in 1934, the Merchandise Marks Acts, the Trading with the Enemy Act of 1939, and other wartime legislation and regulations, the Geneva Convention Act of 1911 and the Board of Trade Order of 1951 vesting in the Custodian of Enemy Property all enemy-owned trade-marks registered after September 3, 1939.

The chapters dealing with procedures, administrative and judicial, defenses, and relief granted are particularly well done. They are forthright and so simply presented that the American lawyer unfamiliar with British practice can follow an imaginary case from its inception to its conclusion.

This volume is no doubt indispensable to the British specialists in the field of trade-mark law. It will also become indispensable to the American lawyers whose clients' interests extend into Great Britain. Its additional importance to the American lawyers lies in the fact that the British Trade-Marks Act of 1938 antedated our own new Act by eight years and many of the provisions of our Trade-Mark Act of 1946 have been patterned after the British Act. It is interesting to compare the interpretations and constructions given by the British courts with those of our own courts in the parallel provisions. Where our courts have not yet had an opportunity to pass on many of such provisions, this book offers an opportunity to the American lawyer to present his arguments based on the interpretations of comparable language by the British courts.

Kerly on Trade-Marks, seventh edition, is a weighty volume, both literally and figuratively. It is one of great importance to all lawyers specializing in the trade-mark field.

DAPHNE ROBERT

New York, New York

HOW ARBITRATION WORKS.

By Frank Elkouri. Washington, D.C.: The Bureau of National Affairs, Inc. 1952. $5.50. Pages xii, 271.

Another inroad is being made into the traditional mode of practicing law. The process of arbitration, particularly labor arbitration, is rapidly cutting into an already diminishing court practice. Since presumably all lawyers are vitally concerned with the methods of adjudication, they will be interested, to say the least, in Mr. Elkouri's book. So too, will all others who work or study in the field of labor-management relations.

As the author points out, "Arbitration in practice is a distinct institution . . . a compromise between the alternatives of resort to courts of law, which are not well adapted to the needs of labor-management relations, and resort to work stoppages, which are wasteful and costly to both parties." This book helps shed light on both the procedural and the substantive aspects of the labor arbitration process.

Have you or your clients wondered: When arbitration is or may be used in labor-management relations? How arbitrators are selected? What are their powers and duties? How do they conduct hearings? Do they follow the rules of evidence observed in courts? What kinds of disputes are commonly presented for decision by an arbitrator? What standards do arbitrators use in determining these issues? You will find the answers to these and many other practical questions in plain and concise language in this little book of only 271 pages.

The author's discussion of knotty substantive problems raised by such matters as seniority, wage adjustments, the ability of the employer to pay, and discharge and discipline of employees, which occupies about 40 per cent of the book, are particularly helpful. Most of the issues are explained and the actual decisions thereon by reputable arbitrators are indicated in a short space, varying from a small paragraph to five or six pages. Here you will find enough economic, industrial and legal background to gain a better insight into the nature and possible disposition of your own problems. Moreover, there are enough reported arbitrator's decisions cited for each type of problem for those who want to do so to thoroughly survey that area.

In this writer's opinion *How Arbitration Works* will become an everyday working tool for many industrial relations officers, union officers and agents, arbitrators, lawyers and law students. Here in compact form will be found quick, authoritative, objective answers to many of the day-to-day questions arising out of the dynamic, contemporary industrial life of America. Perhaps the best expres-

sion this reviewer can give of his opinion of the book is to state that he frequently refers his students in an advanced course in labor law to the book for assistance in understanding the many difficult problems of industrial law.

RANKIN M. GIBSON
University of Toledo
Toledo, Ohio

COPYRIGHT. *By K. Ewart. Cambridge at The University Press. 1952. 50 cents. Pages 19.*

This little book—it is really a pamphlet—is one of a series bearing the general title *Cambridge Authors' and Printers' Guides.* In this issue Mr. Ewart attempts to tell the prospective author when and how he gets a copyright and what he has when he gets it. This book also attempts to tell him what he should not do if he wishes to avoid infringing on other people's copyrights. Mr. Ewart addresses himself primarily to the makers of books and pays little attention to the makers of other kinds of copyrights.

The approach is English, and American law is discussed only as it is of interest to British authors. Even so, some American lawyers may find this book a useful reference to give to prospective authors who are unduly worried about the perils of copyright.

KENNETH B. UMBREIT
New York, New York

NAVY EVIDENCE. *By Howard Brandenburg. Washington: Jones Composition Co. 1952. $7.50. Pages 179.*

Naval officers who work in a tight schedule will be grateful to Commander Howard Brandenburg for compiling for their use a digest of court-martial orders relating to the law of evidence from the years 1916 through June, 1951. Commander Brandenburg is qualified to do this. He is a Commander in the regular Navy and is one of approximately 250 officers who have been designated as law specialists by the Secretary of the Navy.

Commander Brandenburg's book fills a gap which heretofore has existed in this field. Since June, 1951, the new court-martial reports seem to provide a ready source for digesting future court-martial decisions relating to evidence.

Commander Brandenburg reports in the preface to his digest that his primary purpose has been to provide Navy court-martial practitioners who are not lawyers with a digest of past rulings on conventional evidence questions. Those familiar with military courts martial and the pressure of other military duties will realize what a boon Commander Brandenburg's digest is to the busy officers of the United States Navy.

Commander Brandenburg is a member of the Bar in the states of Illinois, Texas and California. During 1947 he was an instructor at the United States Naval School (Naval Justice) at Port Hueneme, California. He is presently stationed at Great Lakes, Illinois, where he is serving as Law Officer of the permanent General Court Martial convened by the Commandant of the Ninth Naval District.

EUGENE C. GERHART
Binghamton, New York

MODERN REAL ESTATE TRANSACTIONS, CASES AND MATERIALS. *By Allison Dunham. Brooklyn: The Foundation Press, Inc. 1952. $8.50. Pages 1029.*

Concerning this book, the author, a professor of law at the University of Chicago, says that its objective "is to bring together for teaching purposes the legal concepts and institutions of the marketing of land"; that "it is organized on the basis of problems in house marketing". House*building* problems are not dealt with. Starting with the raw material, namely, the land on which the housing structure is finally to stand, the problems of processing the land for its intended use—zoning and other restrictions imposed by public authority—are first considered. Next come controls imposed by private agreement—easements, equitable servitudes and covenants running with the land. Here are considered problems of basic policy as to what restrictions and covenants may be enforced, such as restraints on alienation, racial restrictions.

Problems in house marketing occupy some two-thirds of the book. This is as it should be, since few of the students who use this book will ever represent subdividers or wholesale builders, but all of them will have to do with problems affecting the sale or leasing of housing structures. This practical approach is typical. The student will find nothing here about the Statute of Uses, or De Donis, or Quia Emptores. He *will* find something about the Statute of Frauds, for that is an element entering into almost every transaction affecting real property.

In a review of reasonable length, it is possible only to mention some of the house marketing problems dealt with. They cover a field of an extent which will surprise the lawyer who has dealt with such matters piecemeal as they arise in practice. To enumerate a few: Who participates in these transactions—buyer, seller, broker, mortgagee, escrow agent, attorneys for any or all of these—and the laws or customs affecting their participation; documents and papers; when title passes; what constitutes performance; remedies of the parties; title problems and methods of title assurance. The concluding chapter deals with transfers of undivided interests.

Throughout the work is valuable material on the historical, economic and social aspects of house marketing and the preparation of land for residential purposes. As the author is careful to point out in his preface, he espouses no theory. He is a careful and industrious expositor who has presented a well-organized work in which is drawn together from varied sources, not all of them by any means what we commonly term "legal", a vast collection of material dealing with an important field of the law.

The author calls his work a "coursebook". The term suggests casebook, plus something more, giv-

(Continued on page 882)

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *Judges of the Facts*

The trial judge met the foreman of the jury in the hall after an acquittal. "On what basis in the world did you reach that verdict?" he asked. "Why, insanity", replied the foreman. "What? All twelve of you?" exclaimed the judge.

The survival of that oft-told lawyer's story bears witness to the prevalence of judicial criticism of jurors. Regrettably, much of it is not reserved for the courthouse hall but is meted out in open court, often with the accompaniment of a self-righteous direction that the names of the criticized jurors be removed from the jury list.

Judge Rubey M. Hulen in his article in this issue of the JOURNAL, "The Forgotten Man in the Courtroom", places the picture in its true light: the jurors are doing their job at least as well as the judges. The shortcomings of the jury can, to a large extent, be laid at the doorstep of the trial judge and of the system that he administers.

Many a charge is made up of extracts from opinions of the appellate court which were written for the consumption of lawyers and, where the cases were intricate, in language that lawyers themselves would find hard to understand. The trial judge feels that it is more important to save himself from reversal than to instruct the jury in language that is intelligible to them.

Even where the charge as composed by the judge is intelligible, the unjustifiable practice in many of our states permits the lawyers, after that charge has been delivered, to submit requests that certain propositions be charged. In those cases the supplementary and unconnected instructions given are at best ineffective and at worst misleading, while the supplementary instructions refused serve no purpose other than to create happy hunting grounds for error if the requesting party has to appeal. The action of the Judiciary Committee of the House, in reporting unanimously and without a hearing a bill to assimilate the federal practice to that of the particular state where the court sits, is just as inexplicable as Judge Hulen says.

If the courts will devote a little attention to giving the jurors half a chance to decide the facts correctly there will be less occasion than ever for the stupid and discourteous rebukes that sometimes follow the return of verdicts.

A Challenge to the Bar

"A Call to Leadership" by William T. Gossett, appearing in this issue beginning at page 817, brings to the fore a problem which, as he says, is as old as the democratic process. In his words, "There is today no challenge to the latent greatness of the American Bar that so demands action."

The challenge is for the Bar to study, reappraise and declare the proper standards of procedure for legislative investigations, to the end that fundamental principles of constitutional liberty shall be preserved.

A great body of responsible public opinion today sees our liberties jeopardized, and looks to the Bar, hitherto all too silent on the subject, as the only agency which can effectively respond to the challenge. Mr. Gossett calls upon the Bar to undertake the task, and to resume its ancient leadership in the cause of constitutional liberty.

Such matters as subversive activities are, of course, proper fields for legislative investigation. But there is here no proper place for entertaining loose and unsubstantiated charges, leaving to those against whom they have been unjustly levelled no adequate opportunity to obtain vindication. Criticism of such abuse of legislative investigation is too often met by similarly impugning the loyalty of the critics.

These methods constitute an attempt to protect our institutions by adopting the lawless methods of our enemies. To apply the metaphor of a present-day statesman, we must not burn down the house of constitutional liberty to kill the rats gnawing at its foundations.

Surely the American Bar Association's loyalty to our form of government is above any shadow of suspicion or even question. Our Association is in a unique position to accept the challenge, and to undertake the task as an essential service to the cause of constitutional liberty.

■ *Advice to Young Lawyers*

The address to the new members of the profession by President Dodd of the State Bar of Michigan (beginning at page 832 of this issue) sets a high standard. Its stark realism as to the practice of the law, its stern admonitions as to professional conduct and its wise definition of true success at the Bar are informally and humanly expressed. The address is free from the sententious bombast too often pervading the advice of older lawyers to novitiates. Its directness adds force to its soundness.

Editorial From a Member of Our ADVISORY BOARD

■ *Looking Ahead by Looking Back*

Here in Japan during this July, having climbed to the crater of a smouldering volcano and survived in a rumbling earthquake, and having glanced at the experimental government in Tokyo and listened to newscasts of the Republican and Democratic conventions, habit thinking has been shaken off enough for me to advance the controversial suggestion that the convention system as a step in selecting our national executives be abolished.

Doubts about the system are reflected in many recent publications. In *Newsweek* the "Periscope" said: "The first Democratic delegates arriving in Chicago were so confused by the situation that they began interviewing the newsmen to find out what was going on." In the *Seattle Times* the title, "Convention System on Trial at Chicago", headed an editorial appraising the preconvention uncertainty of both major parties which predicted that of an approximate 3000 men and women having votes, a much smaller number would determine the results, and that "a heavy responsibility rests upon these key individuals" who should "recognize this fact".

To drop to the local level, I have noted with surprise during the last and the present election years the ignorance among earnest political workers concerning the operations of party machinery. In short, I agree with others that the convention system offers opportunity for close calculations of the knowing few to dominate over the complete confusion among the uninitiated many.

However, conventions have somehow succeeded in nominating some great men—some elected, some defeated. But largely for other reasons than the uncertainties of convention outcome, I question the wisdom of perpetuating the system in our political procedure. I criticize the national convention for the certainties that:

(1) To win, the nominee must qualify as a dramatic candidate with popular vote appeal—a prerequisite seldom mixed in a personality with those heights and depths of head and heart essential to the stature of statesmanship after election;

(2) To win, the nominee must himself exert the utmost of mental and physical effort during months of concentrated campaigning, thus exhausting much of the reserve energy which should be preserved for performance of official duties;

(3) To win, the nominee must be financed by compaign funds in an enormous aggregate amounting to millions of reported and unreported dollars, some of which will expect the interest of influence;

(4) To win, the nominee must be supported by the immeasurable activity of millions of people sacrificing time needed but lost for economic production.

These realistic reasons for dissatisfaction with the system are sufficiently serious to call for collective reconsideration by lawyers, as the leaders in governmental guidance, with the design of discovering a remedial device for picking presidents in future years when this nation must neither falter nor fail in its destiny. Our forefathers in framing the constitution made provision creating the "Electoral College", an institution soon distorted and discarded by self-serving politicians. Can it be revamped and revived? Let us look back, then ahead.

LANE SUMMERS

Seattle, Washington

Editor's Note: The above editorial was written while Mr. Summers was in Tokyo, Japan, during August. In his letter accompanying the editorial, Mr. Summers said in part: "I advise you never to be induced to come to Japan in the summer season. I have known high degrees of temperature in our land; but in this city in an hour after a bath I hate my own sticky skin.

"As a small matter of gossip, I really enjoyed attending a session of the Supreme Court of Japan earlier this week, after which, I was honored by an extended visit with its Chief Justice (to the tune of tea, as usual)."

Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE PRESIDENT'S PAGE

ROBERT G. STOREY

■ To be chosen as President of the American Bar Association by my fellow lawyers is an honor for which I am humbly grateful. I am very conscious of the magnitude of the duties of the office and the opportunities for service. I pledge my best efforts to the Association and the furtherance of its objectives during the coming year. As this page is being written well in advance of the adoption of specific objectives for the year, I can only comment upon a few items that will challenge the American lawyers. Foremost among these is the necessity for an adequate Headquarters for the American Bar Association.

It is apparent that the permanent home of the American Bar Association should be more than the minimum office space required for administrative and housekeeping facilities. Certainly we must provide ample and modern offices for our loyal and efficient staff. We shall be eternally indebted to our faithful Headquarter's officials and employees for their noble services in the crowded and insufficient building at 1140 North Dearborn.

The House of Delegates has decided that the new Headquarters shall be located in Chicago. Our first task is to finance and construct an American Bar Association Headquarters building of proper size and dignity to make all American lawyers proud of our Association home—and it should be more than an administrative headquarters. It should serve the legal profession of the United States and symbolize the rule of law. We must provide adequate facilities to attract members of our profession to engage in earnest studies and thorough consideration of bar association objectives. This requires, in addition to administrative space, adequate facilities for meetings of the Board of Governors, key committees, Section Councils and other groups. I believe that the American lawyers want a home in which their leaders may study, consider and recommend solutions of bar association problems and not be limited to hurried consideration of weighty matters in a one-day meeting in a crowded hotel room. The practicing lawyers should develop "trends in the law" just as law schools, through study, research and publications, have continuously created. Trends of law developed from both sources are desirable. To achieve the desired results the American Bar Association Headquarters should include a library of reports and treatises of all bar association activities, including local, state, national and international.

The Diamond Jubilee Year affords an unusual opportunity to consummate our dream of an adequate headquarters which will include library facilities that will permit research into bar association objectives and problems. Certainly we will not compete with any existing law schools, law centers or universities but will work in co-operation with them. To finance and complete such American Bar Association Headquarters during the Diamond Jubilee Year will afford a real opportunity for the American Bar Association to enter upon a new era of service and activity.

International Congress of Free Jurists

This page is being written while Mrs. Storey and I are on an air trip around the world ending at San Francisco a week prior to the Annual Meeting. Many lasting impressions come from such a journey near the Iron Curtain. One of the most significant experiences was the information from the first meeting of the International Congress of Free Jurists at Berlin during the last week of July. The movement is sponsored by Dr. Theodore Friedenan and other lawyer "escapees" from the Soviet Zone of Germany. The *Readers Digest* of September, 1951, contains a good summary of the organization. I checked Dr. Friedenan and his committee very carefully through private and governmental sources and found them to be very sincere, courageous and effective against the Communist judicial system. They are in constant danger and several Soviet kidnappings of their associates have occurred, the most recent and prominent being the brutal and illegal seizure of Dr. Walter Linse (*Time*, July 21, 1952).

Representative lawyers, jurists and members of law faculties from forty-two free nations participated in the meeting at Berlin. Having heard personal reports, examined authentic documents from the Communist courts and listened to "escapees'" interrogations, I am convinced that the Soviets are troubled and amazed at the universal condemnation of their maladministration of justice. The facts disclose four flagrant abuses of an impartial judicial system:

1. "Peoples Courts", composed largely of laymen, decide cases principally upon directions from the Communist political officials and are not independent.

2. There is no forum such as a grand jury to which the citizen who has a complaint may go for impartial investigation.

3. They do not follow in actual practice their own written laws, and

4. The legal profession is not independent.

Berlin is an island city state sur-

rounded by the Soviet Zone. Eastern Soviet Germany is another world with illegality and oppression. During the past four years 1718 judges and lawyers have fled from the Soviet Zone. Almost 200,000 others have sought refuge in Western Germany during the same period. Hundreds of others flee daily.

The lawyers of the free world should universally condemn the abhorrent reign of terror of the Soviet-dominated judicial system and support the efforts of those exposing such tyranny. Affirmative action will give additional hope and courage to those victims of injustice and encourage other lawyers of the free world to continue their efforts to maintain, improve and extend an independent legal profession for all free people.

The Oath of a Lawyer

(Continued from page 832)

system of law and procedure. If our profession is to go forward your generation must do its part toward bringing reality a little closer to ideal.

Some of you, no doubt, have positions awaiting you in established law offices where you will undergo a period of apprenticeship and adjustment to the practicalities of the law. Some of you will go immediately into general practice for yourselves. Some of you will enter the fields of industry and commerce instead of the general practice.

All of you, however, are now officers of the court. Each of you has taken a solemn oath, respect and observance of which must guide your future conduct as lawyers. An oath which requires you to set your course of conduct above the everyday concept of acceptable human behavior . . . and to conduct your professional life upon a higher plane than that demanded of those who earn their livelihoods in nonprofessional fields.

The administration of that oath was not a mere ceremonial act. If, by any chance, there be one among you to whom it has no meaning, no significance, beyond mere ceremony, I say to him, tear up your certificate of admission . . . you will find that the profession of the law has little to offer you, and you little to offer it.

I can offer you no magic formula for attaining quick and easy success in the practice of the law. In fact I am not sure that I could define success as applied to the practice of law. Certainly, it does not consist merely of making money, necessary and desirable as that difficult feat is. Certainly it does not consist merely of developing a large and wealthy clientele, a pleasant, comforting and lucrative phenomenon. Certainly it does not consist merely in developing the ability to handle litigation successfully, or business problems to the advantage of your client—much as we all strive to attain those elusive ends.

Nor do I think that all of these things together would *necessarily* add up to success.

Success in the practice of the law must be gauged by different standards from those by which we judge business or commercial successes. And if I were to attempt to define success in the practice of the law, I believe I should put it this way: The only successful lawyer is he who has earned the honest respect and admiration of his fellow lawyers and the confidence and respect of the courts before whom he practices.

Lawyers know lawyers. Judges know lawyers.

You are entering a profession which, in almost every transaction in which you engage, will place you in contact with another lawyer or with a member of the judiciary, or both. Your conduct will be under constant scrutiny. Your ability, your fairness, your integrity will be noted and catalogued for future reference by every lawyer with whom you deal and by every judge before whom you appear.

In order to earn the respect and confidence of lawyers and judges you must, of course, be known to them. I suggest that you take an early part in the activities of your bar associations, both state and local. By so doing you will not only acquire opportunities for service to the profession, but your interest in professional activities will be sharpened. Your acquaintanceship with the members of the Bench and Bar will be vastly broadened.

With remarkably few exceptions, you will find the members of the Bench and Bar genuinely eager to aid you and to counsel with you with respect to the unfamiliar problems with which every young lawyer is confronted. Formidable as they may appear *en masse*, each of these judges is a human being, even as you and I. Each was at one time a young lawyer, struggling to break into practice. Seek their counsel and that of experienced and respected members of the Bar. Follow their precepts.

Observe your professional oath, not only in letter but in spirit. Apply the learning which the Board of Law Examiners has certified that each of you possesses, and I can safely predict that all of you will be successful lawyers.

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

CITIZENS

Treason Conviction of United States Citizen with Dual Nationality Upheld

■ *Kawakita* v. *United States*, 343 U. S. 717, 96 L. ed. Adv. Ops. 799, 72 S. Ct. 950, 20 U. S. Law Week 4423. (No. 570, decided June 2, 1952.)

Kawakita was a citizen of the United States by birth and of Japan under Japanese law. Upon trial for treason for mistreatment of American prisoners of war, he defended by contending that he had renounced his American citizenship and was expatriated. The following are the facts of the case: Kawakita had gone to Japan in 1939, travelling under an American passport, and had become a student at a Japanese university. The declaration of war between the United States and Japan in 1941 made it impossible for him to return to this country. He obtained employment in Japan as an interpreter at a factory where he worked until the end of the war. Until 1943 he was registered as an alien on the records of the Japanese police; in that year he registered his name in the Koseki, a family census register and accepted labor draft papers from the Japanese Government. Later he travelled under a Japanese passport. In December, 1945, he went to the United States consul at Yokohama and applied for registration as an American citizen, stating under oath that he was a citizen of the United States and had not done various acts expatriating himself. He was issued a passport and returned to the United States in 1946, where he was arrested after a former American prisoner recognized him. He was tried and found guilty of treason and received a death sentence. The judgment was affirmed by the Court of Appeals for the Ninth Circuit. The Supreme Court affirmed.

Mr. Justice DOUGLAS, speaking for the Court refused to hold as a matter of law that petitioner had expatriated himself by his acts and conduct beginning in 1943. The opinion examined the nature of dual nationality, noting that a person may have and exercise rights of nationality in two countries and be responsible to both: "The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other." Thus, Kawakita's actions in signing the Koseki, use of a Japanese passport on a trip to China during the war, and his acceptance of labor draft papers from the Japanese Imperial Government were held not to be clear acts of renunciation of his American citizenship. The Court declared that the ambiguous nature of the petitioner's position was one peculiarly for the jury to resolve, and the jury might well have taken these acts as amounting to no more than a public declaration of a pre-existing and established fact: Kawakita's Japanese nationality.

It was also urged that a person who has dual nationality can be guilty of treason only to the country where he resides, and that, while residing in Japan, petitioner's paramount allegiance was to that country. The Court rejected this, pointing out that the constitutional definition of treason contains no territorial limitation and that petitioner's status as a Japanese national would not relieve him from all allegiance to the United States so long as he did not renounce his American citizenship: "He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of a traitor."

As for a contention that the overt acts alleged had not been proved sufficiently to satisfy the constitutional test, the Court set forth the instances of cruelty toward American prisoners of which Kawakita had been guilty, declaring that they clearly amounted to "giving aid and comfort to the enemy", which the jury was justified in finding were encouragement of the Japanese war effort. That the petitioner had "adhered to the enemies of the United States" was held to be sufficiently proved by the testimony of the various witnesses of his words and conduct at the factory where he worked; it was noted that petitioner himself had conceded that he felt no loyalty to the United States and had thrown his lot in with Japan.

The Court gave short shrift to a contention that the imposition of the death sentence was so severe as to be arbitrary. It declared: "Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering."

Mr. Justice FRANKFURTER and Mr. Justice CLARK took no part in the consideration or decision of the case.

The CHIEF JUSTICE wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice BURTON joined. In their view, petitioner's conduct during the years 1943-1945 consistently demonstrated his allegiance to Japan and he had expatriated himself "as well as that can be done". In their view, petitioner's statement after the war, that he was still an American citizen, could not restore the citizenship he had renounced.

Reviews in this issue by Rowland L. Young.

The case was argued by Morris Lavine and A. L. Wirin for the petitioner, and by Oscar H. Davis for the United States.

COMMERCE

Interstate Commerce Commission Held To Have No Power To Establish Through Route Without Making Special Findings

■ *Thompson* v. *United States*, 343 U. S. 549, 96 L. ed. Adv. Ops. 784, 72 S. Ct. 978, 20 U. S. Law Week 4438. (No. 513, decided June 2, 1952.)

The Omaha Grain Exchange filed a complaint with the Interstate Commerce Commission alleging that the rates of the Missouri Pacific Railroad, of which Thompson was trustee, for the shipment of grain from points of origin in Kansas were unreasonable and discriminated against Omaha in violation of the Interstate Commerce Act. For example, the Missouri Pacific provided service from Lenora, Kansas, a typical point of origin, to Omaha via Atchison at the rate of 25.5 cents per hundred pounds. Midway between Lenora and Atchison, at Concordia, Kansas, the Missouri Pacific connects with a line of the Chicago, Burlington and Quincy that runs northeast from Concordia to Omaha. It was contended that the route from Lenora to Omaha via Concordia and the Burlington was "a practicable through route". The Missouri Pacific rate for hauling grain from Lenora to Kansas City was 19 cents per hundred pounds. The Missouri Pacific route from Lenora to Kansas City was approximately the same length as the route from Lenora to Omaha via Concordia, but the combined Missouri Pacific and Burlington rate for that route was about 30 cents. Concordia is a point of interchange of traffic between the two roads and there was evidence that the roads offered through transportation from Lenora to points on the Burlington line short of Omaha, but there was no showing that any shipment was ever made from Lenora to Omaha via the Concordia route or that the roads had ever offered through service to Omaha over that route. The Commission held that a through route from Lenora to Omaha via Concordia was in existence and hence did not have to be established, and it ordered the appellant to provide transportation of grain from Lenora to Omaha at rates not exceeding those charged on like traffic to Kansas City (19 cents). The Commission did not consider the reasonableness of Missouri Pacific's rate for the Atchison route nor did it find that the local Missouri Pacific rate to Concordia was unreasonable or discriminatory. A three-judge district court, one judge dissenting, upheld the Commission, concluding that the "evidence of a physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha" furnished sufficient basis for the Commission's finding of a through route. On direct appeal to the Supreme Court, the judgment was reversed.

Speaking for a unanimous Court, the CHIEF JUSTICE held that the Commission erred in finding that a through route existed via Concordia. He cited Section 15 (4) of the Interstate Commerce Act which prohibits the Commission, in the absence of special findings not made here, from establishing through routes when such an establishment would require a carrier to short haul itself. "Establishment of a new through route from Lenora to Omaha, via the Burlington, would compel the Missouri Pacific to permit use of the Lenora-Concordia portion of its line in the new through route to Omaha in competition with the Missouri Pacific's own route from Lenora to Omaha via Atchison" it was declared. ". . . the test of the existence of a 'through route' ", it was said, "is whether the participating carriers hold themselves out as offering through transportation service." The existence of connecting lines and the fact that Missouri Pacific and the Burlington offered through service from Lenora to points on the Burlington's line short of Omaha were held not to justify the finding that a through route to Omaha already existed; such a result would deprive the Missouri Pacific of its right guaranteed by Section 15 (4) to serve Omaha by its own line, the Court held.

The case was argued by Toll R. Ware for appellant, and by Samuel R. Howell for the Commission.

COMMERCE

Interstate Commerce Commission Has Power To Substitute Joint Rates for Combination Rates on Existing Through Routes in Order To Assist Carrier Financially

■ *United States* v. *Great Northern Railway Company*, 343 U. S. 562, 96 L. ed. Adv. Ops. 792, 72 S. Ct. 985, 20 U. S. Law Week 4433. (No. 151, decided June 2, 1952.)

This was a suit to enjoin enforcement of an order of the Interstate Commerce Commission establishing joint rates over existing through routes. The Montana Western Railway Company furnishes the only rail service from Valier, Montana, to Conrad, Montana, where it connects with the interstate lines of appellee, the Great Northern Railway. Montana Western applied to the Interstate Commerce Commission for permission to abandon its entire line on the ground that continued operation was economically unfeasible. The Valier Community Club, representing shippers in the Valier area, instituted this action before the Commission for the purpose of preserving the existing route by securing additional revenue for Montana Western. The shippers requested the Commission to substitute joint rates for grain shipment for the existing combination rates over the through route from Valier to Minneapolis. The combination rate was 71.5 cents per hundred pounds of grain, consisting of Montana Western's separately established proportional rate of 9 cents from Valier to Conrad and Great Northern's proportional rate of 62.5 cents from Conrad to Minneapolis. The Commission agreed that the public need for rail service in the Valier area called for denial of the abandonment

application and ordered establishment of joint rates. It set 16.3 cents per hundred pounds as Montana Western's share of the 71.5 cents, conceding that this proportionally high share in Montana Western's favor was but a means of assisting that railroad to meet its financial needs. A three-judge district court enjoined enforcement of the Commission's order, holding that it was in violation of Section 15 (4) of the Interstate Commerce Act, which forbids the establishment by the Commission of "through route and joint rates applicable thereto . . . for the purpose of assisting any carrier that would participate therein to meet its financial needs". The Supreme Court reversed on direct appeal.

The Court's opinion, written by the CHIEF JUSTICE, declared that, under Section 15 (3) of the Act, the Commission is empowered to establish joint rates, while Section 15 (6) authorizes it to determine divisions of revenue between carriers. Section 15(4) was said to be a limitation on Section 15 (3) and prohibits the Commission from establishing a through route that would require a carrier to short haul itself (see *Thompson* v. *United States,* reviewed *supra*). The Court stressed the fact that, in this case, the through route from Valier to Minneapolis already existed and was not established by the Commission in the order under review. The opinion rejected a contention advanced by the appellant that the financial assistance prohibition of Section 15 (4) was but a further restriction on the Commission's power to require a carrier to short haul itself.

In upholding the Commission's power to prescribe joint rates in this case and to make the proposed division, the Court held that Section 15 (4) does not limit the Commission's power to establish joint rates generally, but deals only with the power to establish "through route and joint rates applicable thereto". The Court declared that it was one thing to assist a financially weak carrier by redistributing revenues, as had been done here, and quite another to provide such assistance by establishing through routes, which might cause "important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas."

Mr. Justice BLACK, Mr. Justice JACKSON and Mr. Justice BURTON concurred in the result.

The case was argued by Ralph S. Spritzer for the United States and the Interstate Commerce Commission, by Arnold H. Olsen for the Valier Community Club and the Board of Railroad Commissioners of Montana, by Art Jardine for the Montana Western Railroad, and by Louis E. Torinus, Jr., for the appellee, Great Northern.

CONSTITUTIONAL LAW

State Statute Requiring Defendant To Prove Insanity "Beyond Reasonable Doubt" as Defense to Murder Charge Held Not To Violate Due Process

■ *Leland* v. *Oregon,* 343 U. S. 790, 96 L. ed. Adv. Ops. 901, 72 S. Ct. 1002, 20 U. S. Law Week 4443. (No. 176, decided June 9, 1952.)

Leland was convicted in an Oregon court of the crime of murder in the first degree. He had pleaded not guilty and gave notice of his intention to plead insanity. The jury returned a verdict of guilty and petitioner was sentenced to death. The conviction was affirmed by the Oregon Supreme Court. Oregon statutes require a defendant to prove insanity beyond a reasonable doubt and make a "morbid propensity" no defense. On appeal to the Supreme Court of the United States, Leland contended that this statute in effect requires a defendant pleading insanity to establish his innocence by disproving beyond reasonable doubt elements of the crime necessary to a verdict of guilty. He argued that the statute therefore violates the due process guarantee of the Fourteenth Amendment.

The conviction was affirmed by the Supreme Court, Mr. Justice CLARK writing the opinion. After reviewing Oregon law and the charge to the jury, the Court concluded that it was clear that the "burden of proof of guilt, and all the necessary elements of guilt, was placed squarely upon the State. . . . The jurors were to consider separately the issue of legal insanity *per se*—an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict. On this issue appellant had the burden of proof under the statute in question here." The Court said that the Oregon law adopted the nineteenth century view of proof of insanity and that the modern English rule is similar to that of Oregon. While Oregon is the only state that requires the accused to establish the defense of insanity beyond reasonable doubt, the Court found that some twenty states require the accused to establish his insanity by a preponderance of the evidence. ". . . we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here" the Court declared. "Oregon merely requires a heavier burden of proof." The Court pointed out that this was not a case in which it was sought to enforce against the states a right that was secured to defendants in the federal courts by the Bill of Rights. An argument that due process was violated by the provision that "a morbid propensity to commit prohibited acts, existing in the mind of the person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor" was rejected, with the statement that this merely amounted to a legislative adoption of the "right and wrong" test of legal sanity in preference to the "irresistible impulse" test.

Joined by Mr. Justice BLACK, Mr. Justice FRANKFURTER dissented in an opinion that maintained that the Oregon statute compelled the accused to satisfy the jury beyond reasonable doubt that, being incapable of committing murder, he had not committed murder and that this amounted to relieving the state of the burden of proving its case.

The case was argued by Thomas H. Ryan for the appellant, and by J.

Raymond Carskadon and Charles Eugene Raymond for appellee.

CONSTITUTIONAL LAW

Evidence Obtained By Use of Concealed Radio Transmitter Held To Be Admissible in Federal Courts

■ *On Lee* v. *United States*, 343 U. S. 747, 96 L. ed. Adv. Ops. 770, 72 S. Ct. 967, 20 U. S. Law Week 4417. (No. 543, decided June 2, 1952.)

Petitioner, On Lee, was convicted in a United States District Court of selling and of conspiring to sell opium. The Court of Appeals sustained the conviction by a divided court. The opinion of the Supreme Court was confined to the question of the admissibility in evidence of two conversations petitioner had, while at large on bail pending trial, with one Chin Poy. Chin Poy, an acquaintance of the petitioner, entered On Lee's living quarters carrying a small radio transmitter concealed on his person. Their subsequent conversation was broadcast to an agent of the Narcotics Bureau stationed outside with a receiving set, where he could see Chin Poy and the petitioner through the window. Another conversation was similarly audited by the agent a few days later. At the trial, the agent was allowed to relate the conversations he had heard on his receiving set. Petitioner contended that this evidence should have been excluded, arguing that it had been obtained in violation of the search-and-seizure provisions of the Fourth Amendment and of Section 605 of the Federal Communications Act. He also argued that the testimony should be held inadmissible under the power of the judiciary to require fair play in federal law enforcement.

Speaking for the Supreme Court, Mr. Justice JACKSON affirmed, holding that the conduct of Chin Poy and the agent did not constitute an unlawful search and seizure under the Fourth Amendment. There was no trespass, it was pointed out, since Chin Poy entered with the consent of the petitioner who talked "confidentially and indiscreetly with one whom he trusted". The fact that the evidence was obtained by the use of a radio was said to have the same effect on On Lee's privacy as if the agent had been eaves-dropping outside an open window: "The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." The contention that Chin Poy's subsequent "unlawful conduct" vitiated the consent to his entering and made the entry a trespass *ab initio* was rejected on the theory that that doctrine applies in civil cases only. No violation of the Federal Communications Act was found. "Petitioner had no wires and no wireless. There was no interference with any communications facility which he possessed or was entitled to use" it was declared. The Court refused to exclude the evidence as a means of disciplining law enforcement officers under the *McNabb* doctrine, pointing out that neither the agent nor the informer had violated any federal law in obtaining the evidence.

It was noted that Mr. Justice BLACK believed that the Court should have exercised its supervisory authority over criminal justice in the federal courts to hold that the district court should have rejected the evidence.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he deplored the use of "dirty business" by police officers to obtain convictions. He declared that such methods make for "lazy" law enforcement and that the circumstances of the instant case showed how the rapid advances of science are made available for police intrusion into private lives.

Mr. Justice DOUGLAS wrote a dissenting opinion in which he held that "the controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments." He quoted at length from the dissent of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, 48 S. Ct. 564.

Mr. Justice BURTON wrote a dissenting opinion in which Mr. Justice FRANKFURTER joined, expressing his agreement with the dissenting opinion in the court below which would have held inadmissible "what [the agent] overheard by means of a radio transmitter surreptitiously introduced and operating, without warrant or consent, *within* the owner's premises". Chin Poy's taking the radio transmitter with him into petitioner's quarters, the dissent said, amounted to taking the agent with him surreptitiously.

The case was argued by Gilbert S. Rosenthal for the petitioner, and by Robert S. Erdahl for the United States.

CONSTITUTIONAL LAW

Conviction of Murder Upheld Over Allegations of Denial of Due Process

■ *Stroble* v. *California*, 343 U. S. 181, 96 L. ed. Adv. Ops. 529, 72 S. Ct. 599, 20 U. S. Law Week 4244. (No. 373, decided April 7, 1952.)

Petitioner was convicted of murder in the first degree and sentenced to death by a California court. The Supreme Court of California affirmed the conviction. The case was brought to the United States Supreme Court on writ of certiorari, petitioner contending that his conviction was in violation of the due process clause of the Fourteenth Amendment. He claimed (1) that his conviction was based in part on a coerced confession; (2) that a fair trial was impossible because of inflammatory newspaper reports inspired by the district attorney; (3) that he was in effect deprived of counsel in the course of his sanity hearing; (4) that there was an unwarranted delay in his arraignment; and (5) that the prosecuting officers unjustifiably refused to permit an attorney to consult with him shortly after his arrest. The facts may be summarized as follows: The brutal murder of which petitioner was convicted was that of a 6-year-old girl and aroused great excitement in the Los Angeles area. Petitioner was arrested as a suspect and was questioned by a police officer in the presence of a civilian and a park foreman. At the trial, there was some evidence that petitioner had

had his shin kicked "once or twice" and that he had been slapped by a policeman. Police testimony denied this. Petitioner confessed to police while being driven to the police station. The allegedly coerced confession was signed at the district attorney's office after two hours' questioning. A recording made during this time disclosed no mistreatment during the time the confession was obtained. During the questioning, an attorney asked to see the defendant, but was denied admission until after the confession had been completed. A physician who examined petitioner when the confession had been signed testified that there were no bruises or abrasions on petitioner's body. Four psychiatrists and a clinical psychologist examined the prisoner during the period he was awaiting trial, and he confessed the crime to each of them. No objection was made to the admission of these confessions in evidence. The case aroused great excitement, and stories describing the prisoner as a "werewolf", a "fiend", and a "sex-mad killer" appeared in the local press. On the day petitioner was arrested, the district attorney released the details of his confession to the papers at periodic intervals while it was being made and the newspapers reprinted the entire confession four days later. Most of these events were reported on the front page accompanied by large headlines. The excitement had died down at the time of the trial, six weeks later, and the trial itself was reported on the inside pages for the most part. No objection was made to newspaper coverage of the trial itself.

Speaking through Mr. Justice CLARK, the Supreme Court of the United States affirmed the conviction over petitioner's due process contentions. The Court declared that it could not fairly be said that the confession in the district attorney's office was coerced "even if we give petitioner the benefit of every doubt". The Court pointed out that the record showed that the petitioner had been "anxious to confess to anybody who would listen" and that he had made at least five confessions that were admittedly voluntary. The Court could find nothing to show that the newspaper stories aroused such prejudice in the community as to prevent a fair trial. It was noted that no effort had been made to obtain a change of venue and that the allegedly inflammatory newspaper accounts appeared six weeks before the trial began. As for the allegation that petitioner had been denied effective counsel when he waived trial by jury on the insanity issue, the Court said that the Public Defender had appeared himself for the defendant at this point, at the request of the court, and that the Defender was thoroughly versed in the facts and had consulted his two assistants who had represented the petitioner at the trial. The Court said that the refusal to admit the attorney while petitioner was making his confession in the district attorney's office, although improper, was not a denial of due process. Petitioner himself had not asked for counsel, and the attorney had merely come to inquire of petitioner himself whether he were guilty, at the request of the prisoner's son-in-law.

Mr. Justice FRANKFURTER, in a dissenting opinion, said that the inflammatory newspaper stories, instigated by the district attorney himself, might have been prejudicial and that the affair was certainly not "the traditional concept of the 'American way of the conduct of a trial'". He also expressed doubt as to the Court's holding on the issue of the voluntary nature of the challenged confession.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote an opinion dissenting on the ground that it was unlawful for the police not to permit the attorney to see the petitioner until after he had finished his confession and that the jury may well have relied in part upon the illegally obtained confession in arriving at their verdict.

The case was argued by John D. Gray and A. L. Wirin for the petitioner, and by Adolph Alexander for the respondent.

CRIMINAL LAW

Judgment of Lower Court Reversed upon Confession of Error by Government

■ *Casey* v. *United States*, 343 U. S. 808, 96 L. ed. Adv. Ops. 924, 72 S. Ct. 999, 20 U. S. Law Week 4451. (No. 379, decided June 9, 1952.)

In this case there was a claim of an unreasonable search and seizure of evidence, the admission of which vitiated the convictions. The Solicitor General confessed error and asked that the judgment below be reversed, leaving the way open for a new trial. The Supreme Court reversed *per curiam*, noting that to accept the confession of error "would not involve the establishment of any precedent".

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. JUSTICE REED, wrote a dissenting opinion. The dissent stated that the Court of Appeals had ruled that petitioners had no standing to complain of the search, but that doubt had been cast on this ruling by the intervening case of *United States* v. *Jeffers*, 342 U. S. 48, 72 S. Ct. 93, and the Justice Department now maintained that the district court should not have admitted the evidence. The dissent said: "Since the Court of Appeals did not reach that issue, when the case was before it, we should at the very least remand the case to it for consideration of that question. If we are to decide it, we should do so only after full exploration of the facts and the law. Whatever action we take is precedent" the opinion held.

LABOR LAW

Federal Courts Held To Have Power To Enjoin Enforcement of Collective Bargaining Agreement That Discriminates Against Negroes

■ *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, 96 L. ed. Adv. Ops. 917, 72 S. Ct. 1022, 20 U. S. Law Week 4453. (No. 458, decided June 9, 1952.)

In this decision the Court held that the federal courts have jurisdiction to grant injunctive relief to

Negro railroad employees threatened by loss of their jobs under compulsion of a bargaining agreement which, to avoid a strike, the railroad made with an exclusively white man's union. The Negro employees involved were "train porters" who had for years actually performed the work of brakemen. In 1946, the St. Louis-San Francisco Railway Company, one of the respondents in this case, signed an agreement with the Brotherhood of Railroad Trainmen, a white union, that provided that train porters should no longer do the work "generally recognized as brakemen's duties". The complaint alleged, and the district court found, that this was the culmination of a campaign of more than twenty-five years of "aggressive hostility to employment of Negroes for train, engine and yard service" waged by the white unions. It was further alleged, and held by the district court, that the economic unsoundness of keeping the train porters after the loss of their "brakeman" functions made complete abolition of the "train porter" group inevitable. The district court refused to grant injunctive relief, however, on the ground that the complaint raised questions that were, under the Railway Labor Act, for the exclusive jurisdiction of the National Mediation Board and the National Railroad Adjustment Board. The Court of Appeals reversed, holding that the agreement between the union and the railroad was an "attempted predatory appropriation" of the train porters' jobs, and was to this extent illegal and unenforceable.

The Supreme Court affirmed in an opinion delivered by Mr. Justice BLACK. The Court rested its decision upon *Steele* v. *Railroad,* 342 U. S. 940, 65 S. Ct. 226. While admitting that the facts were somewhat different, the Court took the view that the principle of the *Steele* case was controlling: ". . . these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the *Steele* case 'discriminations based on race alone are obviously irrelevant and invidious. Congress did not undertake to authorize the bargaining representative to make such discriminations' ". In holding that injunctive relief was appropriate, the Court said that "no adequate administrative remedy can be afforded by the National Railway Adjustment or Mediation Board. . . . This dispute involves the validity of the contract, not its meaning. Nor does the dispute hinge upon the proper craft classifications of the porters. . . ." The Court observed: "Bargaining agents who enjoy the advantages of the Railway Labor Acts provisions must execute their trust without lawless invasions of the right of other workers." It was noted that in drawing its decree, "the District Court must bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are committed by the Railway Labor Act to the National Mediation Board."

Mr. Justice MINTON wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice REED joined. The dissent took the position that the Brotherhood was under no duty to contract for the "porters" and that no federal law forbade either the Brotherhood or the railroad from discriminating on the ground of race.

The case was argued by Charles R. Judge for petitioner, and by Joseph C. Waddy and Victor Packman for Howard.

LABOR LAW

Employer Bargaining for Inclusion of Management-Functions Clause in Collective Bargaining Agreement Held Not To Have Committed Unfair Labor Practice

■ *National Labor Relations Board* v. *American National Insurance Company,* 343 U. S. 395, 96 L. ed. Adv. Ops. 721, 72 S. Ct. 824, 20 U. S. Law Week 4358. (No. 126, decided May 26, 1952.)

During negotiations between the respondent and the Office Employees International Union, A.F. of L., for a collective bargaining agreement, the union submitted a proposed contract containing, among other clauses, a clause establishing a procedure for settling grievances arising under the contract by successive appeals to management with ultimate resort to an arbitrator. Respondent objected to the proposal for unlimited arbitration and proposed instead a so-called "management functions" clause listing matters such as promotions, discipline and work scheduling as the responsibility of management and excluding such matters from arbitration. The union refused to accept this, and, during further negotiations, the company accepted some of the union's proposals on other matters and offered counterproposals where there was disagreement. One of these counterproposals was a management functions clause. The National Labor Relations Board filed a complaint against respondent based on the union's charge that the company had refused to bargain as required by the National Labor Relations Act. While this proceeding was pending, negotiations continued, the management functions clause remaining an obstacle to agreement. During the negotiations, respondent established new night shifts and introduced a new system of lunch hours without consulting the union. Before the Board reached its decision, the union and the respondent reached an agreement containing a modified management functions clause that withdrew some of the matters from arbitration to which the company objected. The Board ruled, after a review of the entire negotiations, that respondent's unilateral action in changing working conditions during bargaining constituted a refusal to bargain in good faith, and the Board took the position that the company's action in bargaining for the inclusion of a management function clause "constituted, quite [apart from] Respondent's demonstrated bad faith, per se violations of Section 8 (a) (5)

and (1)". The Board ordered respondent to bargain collectively with the union and prohibited respondent from bargaining for any management functions clause covering a condition of employment. The Court of Appeals for the Fifth Circuit agreed that the respondent's actions in changing working conditions while negotiations were proceeding was an unfair labor practice, and ordered enforcement of that part of the Board's order, but it refused o enforce the prohibition against a management functions clause. The Supreme Court affirmed.

Mr. Justice CLARK, speaking for the Court, pointed out that the Act does not compel any agreement between employees and employers nor does it regulate the substantive terms governing hours, wages and working conditions which are incorporated in an agreement. The Court said that enforcement of the obligation to bargain collectively is crucial to the statutory scheme, but that it was not the function of the Board "to compel concessions or otherwise to sit in judgment upon the substantive terms of collective bargaining agreements". The Court found that management functions clauses were common subjects for collective bargaining and rejected the Board's position that the employer here had refused to bargain by seeking to retain initial responsibility for work scheduling, a "condition of employment", for the duration of the contract. The Board had conceded that there was nothing illegal in such a clause, the Court said, but its rule would forbid bargaining for any such clause when the union declines to accept the proposal, even where the clause is offered as a counterproposal to a union demand for arbitration. The Court also upheld the Circuit Court's holding that the company's change in working conditions during negotiations was an unfair labor practice.

Mr. Justice MINTON, joined by Mr. Justice BLACK and Mr. Justice DOUGLAS, wrote a dissenting opinion. In their view, the respondent here "insisted on a clause which would classify the control over certain conditions of employment as a management prerogative, and . . . the insistence took the form of a refusal to reach a settlement unless the Union accepted the clause". This amounted to a refusal to bargain upon those conditions of employment, the dissenting opinion maintained.

The case was argued by Mozart G. Ratner for the petitioner, and by Louis J. Dibrell for the respondent.

PUBLIC UTILITIES

Electric Power Company Obtaining Part of Its Power Supply From Another State Held To Be Subject to Regulation Under Part II of the Federal Power Act

■ *Pennsylvania Water and Power Company* v. *Federal Power Commission, Pennsylvania Public Utility Commission* v. *Federal Power Commission,* 343 U. S. 414, 96 L. ed. Adv. Ops. 746, 72 S. Ct. 843, 20 U. S. Law Week 4350. (Nos. 428 and 429, decided May 26, 1952.)

In 1944, the Maryland Public Service Commission, the Mayor and Council of the City of Baltimore, the Baltimore County Commissioners and several private purchasers of electric power from Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter called "Consolidated") requested the Federal Power Commission to investigate allegedly excessive rates that Pennsylvania Water and Power Company (hereinafter called "Penn Water") was charging Consolidated. After extended hearings, the Commission found that Penn Water had been charging approximately three times what it should and ordered Penn Water to file a new schedule of rates. In subsequent orders, it rejected the new rate schedules filed by Penn Water and itself prescribed the rates which Penn Water here sought to avoid. On review, the Court of Appeals for the District of Columbia Circuit approved the Commission's action, one judge dissenting. The Supreme Court affirmed, speaking through Mr. Justice BLACK.

Penn Water had argued that it was a licensee under Part I of the Federal Power Act and subject to regulation under that part and that it was therefore preluded from regulation under Part II. The Court disagreed, saying that the language of Part II subjects all "public utilities" to regulation and that no reason had been advanced that would justify a judicial exception to the statutory command. The Court explained that Part II proceeds on the assumption that regulation of public utilities transmission and selling power wholesale in interstate commerce is a matter for the Federal Government, while Part I leaves regulation to the states under some circumstances. It was noted that Part I provides that the Federal Government is to protect the consumer if a state regulatory body does not exist or the "States are unable to agree . . . on the services to be rendered or on the rates or charges of payment therefor. . . ." The Commission had found that the states were "unable to agree" here, and accordingly Penn Water was also held to be subject to regulation under Part I.

As for Penn Water's contention that since 83 per cent of its total business consisted of sales to Pennsylvania customers in Pennsylvania and that it was therefore not engaging in interstate commerce, the Court called attention to the fact that Penn Water and Consolidated had been operating under contracts for co-ordinated sale and distribution of electric power in Maryland and Pennsylvania, and that by these contracts, complete pooling of their facilities had been achieved so that in effect they constituted an integrated interstate electric system.

Penn Water also used the argument that the Commission's orders improperly required it to continue to perform an illegal contract and that this contract was the basis for the Commission's findings. It was alleged that the contract between Penn Water and Consolidated subjected Penn Water's affairs to the domination of Consolidated in violation of the federal antitrust laws and the corporation laws of Pennsylvania. Penn Water cited a decision of the

Court of Appeals for the Fourth Circuit which had held the contract illegal and unenforceable. The Supreme Court held that the Commission had not attempted to compel Penn Water to carry out an illegal contract. "To the extent that Penn Water is being controlled, it is by the Commission, acting under statutory authority, not by Consolidated, acting under the authority of private contract terms 'legalized' by the Commission" it was stated.

Mr. Justice FRANKFURTER took no part in the consideration of decision of the case.

Mr. Justice DOUGLAS, joined by Mr. Justice REED, wrote a dissenting opinion which termed the contract between Penn Water and Consolidated an "unholy alliance" condoned by the Commission. The dissent maintained that all competition between the two utilities had been destroyed and that the Commission's order in effect gave Consolidated a veto power over Penn Water's management. This was viewed as a violation of the Sherman Act, and was held to be a strong reason for reversing the Commission.

The case was argued by Wilkie Bushby for Penn Water, by William J. Grove for the Pennsylvania Public Utility Commission, by Solicitor General Perlman for the FPC, by Alfred P. Ramsey for Consolidated, and by Charles D. Harris for the Public Service Commission of Maryland.

SEAMEN

Federal Employee Compensation Act Held To Be Exclusive Remedy for Seamen Injured in Course of Duty as Members of Crew of Public Vessel

■ *Johansen* v. *United States, Mandel* v. *United States*, 343 U. S. 427, 96 L. ed. Adv. Ops. 760, 72 S. Ct. 849, 20 U. S. Law Week 4353. Nos. 401 and 414, decided May 26, 1952.)

In these cases the Supreme Court held that civil service crew members of military transport vehicles who were injured in the course of duty were precluded by the Federal Employees Compensation Act of 1916, 39 Stat. 742, 5 U.S.C. §§751 *et seq.*, from bringing suit for injuries under the Public Vessels Act of 1925, 43 Stat. 1112, 46 U.S.C. §§ 781 *et seq.* Petitioner Johansen in No. 401 was injured while employed as a civilian crew member of the *Kingsland Victory* and brought suit against the United States under the Public Vessels Act for "damages, wages, maintenance and cure". Petitioner Mandel's decedent was killed while employed on a tug operated and controlled by the United States Army. The administrator, Mandel, brought suit under the same act for "wrongful death". Both vessels were public vessels, not merchant ships, and therefore petitioners had no remedy under the Suits in Admiralty Act of 1920. The lower courts had held that the Federal Employees Compensation Act was the exclusive remedy and dismissed.

Mr. Justice REED delivered the opinion of the Supreme Court affirming. The Court agreed that the "literal language of the [Public Vessels] Act would allow actions of the nature of those before us". It went on to say that "This general language, however, must be read in the light of the central purpose of the Act, as derived from the legislative history of the Act and the surrounding circumstances of its enactment". The opinion then reviewed the history of congressional handling of the problem of permitting suits for damages against the Government in cases like these, noting that in the Federal Employees Compensation Act, Congress "undertook to provide a comprehensive compensation system for federal employees who sustain injuries in the performance of their duty", and that, with some exceptions held not to be applicable here, "there has never been any provision in the Compensation Act for election between compensation and other remedies". Petitioners had relied on the 1949 amendment to the Compensation Act, which included a clause making it an exclusive remedy, but provided that "this subsection shall not apply to a master or a member of the crew of any vessel". In reply to this argument, the Court cited the statements of the members of Congress in charge of the 1949 amendment when it was pending to show that Congress had been in doubt as to the exclusiveness of the remedy of compensation and had merely sought to leave the status of seamen unchanged pending more study of the problem. The Court concluded that the 1949 amendment did not alter the rights of seamen in any way: "If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now." The Court found that the acts under consideration were part of a comprehensive scheme of liberalizing the rights of persons who would otherwise be barred from suing the sovereign. There was no reason to have two remedies, the Court said. "As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect."

Mr. Justice BLACK joined by the CHIEF JUSTICE, Mr. JUSTICE DOUGLAS and Mr. Justice MINTON, dissented. In his dissenting opinion, Mr. Justice BLACK said that there was nothing in the language of either the Compensation Act or the Public Vessels Act that barred petitioners' right to sue under the latter; he read the congressional reports on the 1949 amendment to the Compensation Act as an express refusal by the Congress to remit seamen to that Act as their sole remedy for claims of this sort.

The case was argued by Louis R. Harolds for the petitioner in No. 401, by Abraham E. Freedman for the petitioner in No. 414, and by Leavenworth Colby for the United States.

SEAMEN

Set-Off Held Not To Be Available as Defense Against Seaman's Claim for Wages

■ *Isbrandtsen Company, Inc.* v. *Johnson*, 343 U. S. 779, 96 L. ed. Adv. Ops. 911, 72 S. Ct. 1011, 20 U. S. Law Week 4448. (No. 493, decided June 9, 1952.)

In 1948, Johnson, a merchant seaman, was employed by petitioner as a messman on a foreign voyage of a vessel of United States' registry. While the vessel was on its course, Johnson stabbed another member of the crew without justification, injuring him so severely that the ship had to divert its course in order to hospitalize the wounded man. When it discharged him at the end of the voyage, petitioner refused to pay Johnson his wages earned up to the time of the attack. He filed a libel and complaint in the district court, claiming the balance due him on his earned wages, plus interest, transportation to Seattle (his port of signing on) and double wages for each day of unlawful delay in the payment of the sum due. Petitioner set up a counterclaim of $1,691.55 for expenses and losses caused by Johnson's attack on his shipmate. The district court disallowed the counterclaim and entered judgment for the earned wages and transportation allowance, plus interest and costs, but disallowed the double wages. The Court of Appeals for the Third Circuit affirmed.

Speaking for the Supreme Court, Mr. Justice BURTON upheld the courts below on the theory that Congress has pre-empted the area relating to deductions and set-offs based upon dereliction of duty as against a seaman's claim for wages, and that a set-off is not available against such a claim under Rev. Stat. §4547, 30 Stat. 756, 46 U.S.C. §604. The Court pointed out that this legislation is remedial and calls for liberal interpretation in favor of seamen, who are treated as a favored class and are made "wards of the admiralty". The Court found little substance in the suggestion that the expenses at issue here could be brought within the statutorily recognized "forfeitures". While Johnson's attack amounted to a breach of general discipline, it was held not to amount to "willful disobedience to any lawful command at sea" or to "willfully damaging the vessel . . . or . . . any of the stores or cargo".

Mr. Justice JACKSON dissented without opinion.

The case was argued by Mark D. Alspach for the petitioner, and by William M. Alpen for the respondent.

Revolution! — English Style

■ It may perhaps be replied that if a majority of the House of Commons want a revolution they ought to have one; and no doubt if the House of Commons on this point fully represented the settled convictions of the community the reply suffices. But if not? Is there any means of ensuring that in these extreme cases the House of Commons *would* represent the settled will of the community? Is there any ground for expecting that our Cabinet system, admirably fitted to adjust political action to the ordinary oscillations of public opinion, could deal with these violent situations? Could it long survive the shocks of revolutionary and counter-revolutionary violence? I know not. The experiment has never been tried. Our alternating Cabinets, though belonging to different Parties, have never differed about the foundations of society. And it is evident that our whole political machinery presupposes a people so fundamentally at one that they can safely afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict. May it always be so.

—Bagehot, *The English Constitution* (London: Oxford University Press, 1933), pages xxiii and xxiv. [From the introduction by the Earl of Balfour].

Courts, Departments and Agencies

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Administrative Law . . . license revocation . . . Civil Aeronautics Board may revoke operating authority of irregular air carrier whose operations exceeded frequency and regularity permitted by Board regulations.

■ *Air Transport Associates, Inc.* v. *Civil Aeronautics Board,* C.A.D.C., July 10, 1952, Prettyman, C.J.

This was a petition for review of an order of the Civil Aeronautics Board which revoked petitioners' (Associates) operating authority as an air carrier. In 1948 Associates obtained a Letter of Registration as an Irregular Air Carrier which was accompanied by a letter of transmittal informing Associates that operations and public holding out of service between any two points must be confined to flights of such rarity and infrequency as to preclude any implication of a uniform pattern of operations. Pursuant to this Letter of Registration, Associates commenced the air transportation of persons and freight, primarily between Seattle and Alaska. In 1949 the Board informed Associates that an examination of its flight records indicated that its operations exceeded the frequency and regularity permissible under its Letter. Associates then diverted a number of its Seattle-Alaska services from Seattle to a field in Everett, Washington.

Associates argued that that part of the Board's regulations using the phrase "frequency and regularity" was indefinite, uncertain and void for vagueness. However, the Court replied that Associates had had ample notice of the intended scope of the disputed phrase by the letter of transmittal it had received with its Letter and also by the Board's regulations. Associates further contended that the Board had improperly included flights originating from the Everett field as flights from Seattle in its analysis of the flight records. But the Court answered that the Board had not included those flights in its finding that Associates' operations exceeded permissible frequency and regularity. The final contention was that Associates' Letter of Registration was improperly revoked since its violations were not wilful and it did not have proper notice from the Board. However, §9 of the Administrative Procedure Act provides an exception to the notice requirement in cases of wilfulness and the Court stated that the contents of letters from Associates to the enforcement office of the Board established the wilfulness of the violations.

Antitrust Law . . . patent owner bringing infringement action to further existing monopoly and eliminate competitor held liable to competitor for treble damages.

■ *Kobe, Inc. et al.* v. *Dempsey Pump Co. et al.,* C.A. 10th, July 5, 1952, Pickett, C.J.

Plaintiff (Kobe) sued the Dempsey Pump Company (Dempsey) for infringement of its patents on a hydraulic pump for oil wells. Defendant by cross-complaint alleged that plaintiff had abused its patent monopoly in violation of §§1 and 2 of the Sherman Act and counterclaimed for triple damages under §4 of the Clayton Act. The trial court held that plaintiff was guilty of unlawful monopolization and awarded defendant triple damages amounting to $420,093.50. The facts of the case were as follows: Kobe held more than seventy patents on hydraulic pumps and no other hydraulic pump was offered to the oil industry until the Dempsey pump appeared in 1948. When Kobe was informed of the existence of Dempsey's pump, its president, without examining any drawings, stated that he believed that the new pump infringed on the Kobe patents. Kobe then served written notice on Dempsey of its claim of infringement and sent a circular letter to the major purchasers of pumping equipment informing them of the pending infringement action. As a result of the suit and letters Dempsey's activities came to a standstill.

The Court stated that in order to constitute an unlawful monopoly under the provisions of the Sherman Act there must be both the power and purpose or intent to monopolize. It was acknowledged in this case that plaintiff did have a complete monopoly of the business relating to hydraulic pumps for oil wells, but plaintiff contended that its patents had not been misused since its pump competed with other types. However, the Court replied that monopolistic practices need not extend to an entire industry, since the statute prohibits monopolization of "any part" of commerce and the Kobe pump constituted an "appreciable" part of the oil pump industry. As for the intent or purpose of monopolies, the opinion said that intent may be inferred from defendant's business arrangements if those arrangements result in a monopoly as they did here.

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

The next question was the right of defendant to recover treble damages. Kobe argued that holding it liable for bringing the infringement action would amount to a denial of free access to the courts. Although the Court agreed that free and unrestricted access to the courts should not be denied or imperiled, it also insisted that the courts cannot be used "as a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition". The Court said that the facts were sufficient to support the trial court's finding that although plaintiff honestly believed that some of its patents were infringed, the real purpose of the infringement action was to further the existing monopoly and to eliminate Dempsey as a competitor. The opinion then referred to language used in *American Tobacco Company* v. *United States,* 328 U. S. 781, where it was said: "Acts done to give effect to the conspiracy may be in themelves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition". The Court concluded that "To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy."

Army and Navy . . . courts martial . . . *habeas corpus* . . . although due process clause of Fifth Amendment applies to courts martial federal circuit court holds that on a petition for *habeas corpus* its review is limited to cases alleging a flagrant denial of a constitutional right which would affect the military court's jurisdiction.

■ *Burns* v. *Lovett, Dennis* v. *Lovett,* C.A.D.C., July 31, 1952, Prettyman, C.J.

Appellants, American servicemen, were convicted by courts martial of murder and rape and were sentenced to death. The convictions and sentences having been approved by the reviewing authorities they filed petitions for *habeas corpus,* alleging that they had been denied due process of law.

Judge Prettyman, writing the Court's opinion, said that the question presented was whether the allegations of the petitions, viewed in the light of the accompanying data, are sufficient to invoke the jurisdiction of the Court and to require a hearing on the merits. The Court accepted the proposition that the due process clause of the Fifth Amendment applies to men accused before courts martial, but this premise, it said, does not solve the problem since the mere assertion of constitutional rights does not always give rise to a right of *habeas corpus.* In the Court's opinion there are three principles to be followed in this type of case: "(1) An accused before a court-martial is entitled to a fair trial within due process of law concepts. (2) The responsibilities for insuring such fairness and for determining debateable points is upon the military authorities, except (3) that, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the 'jurisdiction' (*i.e.,* the basic power) of the tribunal to render judgment, the courts will review under petition for *habeas corpus.*" Under this rule, a petitioner is not entitled to review of constitutional questions which were, or could have been, raised before the court martial, Judge Prettyman stated, unless there has been "such a gross violation of constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstance, the petitioner has not been able to obtain adequate protection of that right in the military processes".

With respect to the petitions in the instant cases, the Court carefully considered all the allegations in the light of the principles it had enunciated. Petitioner Dennis alleged that his confessions had been coerced, that he was denied opportunity to consult with counsel, that important evidence tending to prove his innocence was suppressed and the atmosphere surrounding the trial was one of hysteria and terror. However, after examining these points individually Judge Prettyman concluded that there was no flagrant disregard of the accused's rights and the allegations did not go to the jurisdiction of the court martial "even under the expanded concept of 'jurisdiction' which we have used in this case". Petitioner Burns' petition was similarly treated.

Judge Bazelon dissented because he believed that individual allegations cannot be singled out to determine just how "flagrant" the unconstitutional actions alleged are, but rather, the fairness of the trial must be determined by an appraisal of the totality of allegations. He was of the opinion that if the allegations here made were proved "they would paint a picture of inquisitorial zeal rather than of a fair trial in the Anglo-American sense". He also cited *Gusik* v. *Schilder,* 340 U.S. 128, for the proposition that the availability of military investigating procedures does not preclude further review by petition for *habeas corpus.*

Civil Rights . . . right of privacy . . . theatrical performer whose act was presented before large audience at football game and televised on sponsored program without his permission cannot recover damages under New York's Civil Rights Law.

■ *Gautier* v. *Pro-Football, Inc. and American Broadcasting Co., Inc. et al.,* N.Y. Ct. of App., July 15, 1952. Froessel, J.

Alleging an invasion of his right of privacy, plaintiff, a theatrical performer, brought this action under the New York Civil Rights Law which permits the recovery of damages for the unauthorized use of a person's name or picture "for advertising purposes or for the purposes of trade". Plaintiff's act was presented before a large audience between the halves of a professional football game. However, a telecast of the

game was being sponsored by a tobacco company and immediately before plaintiff's act appeared a commercial announcement was made. The telecast was given without plaintiff's consent.

The Court ruled that plaintiff could not recover damages because his name and picture had not been connected with the commercial in any way. The opinion said that the commercials were presented at usual intervals and it was only a coincidence that one of them appeared immediately prior to plaintiff's act. Judge Froessel declared that the mere fact of sponsorship of a telecast does not amount to a violation of the statute. The opinion further explained that television, like other media of communication, may have either a trade or news aspect. For example, a person traveling in public may expect to be televised, Judge Froessel remarked, but only as an incidental part of the general scene. A person attending a public event such as a professional football game may be televised "in the status in which he attends". Therefore, the Court concluded that an actual participant in the event is a part of the spectacle and may be televised as the very center of attraction during his performance.

Desmond, J., concurred on the ground that the televising of plaintiff's act was "for advertising purposes", but there was no invasion of any "right to privacy" because the one thing plaintiff, a professional entertainer, "did not want, or need, in his occupation" was privacy. His real complaint, Judge Desmond said, was that he was not paid for the telecasting of his show. But that is an action for breach of contract and cannot be enforced in a suit under the Civil Rights Law he added.

Judges Lewis, Conway and Dye concurred with Judge Froessel. Chief Judge Loughran and Judge Fuld dissented.

Constitutional Law . . . passport revocation . . . Secretary of State's revocation of citizen's passport without notice and hearing held contrary to due process.

■ *Bauer* v. *Acheson*, U.S.D.C., Dist. of Col., July 9, 1952, Keech, D.J.

This was an action against the Secretary of State to enjoin him from denying plaintiff's right to a passport. Plaintiff, a naturalized citizen, works as a journalist in France. In 1951 the State Department informed her that her passport had been revoked and since then it has refused to renew it except as amended so as to be valid only for return to the United States. The only reason given by the State Department for its action was that in its opinion "her activities are contrary to the best interest of the United States".

Although plaintiff contended, *inter alia*, that the Passport Act of 1918 is in violation of her rights under the due process clause of the Fifth Amendment the Court held the statute to be constitutional because it is susceptible of an interpretation which provides for due process. Under the pertinent provision of the law, 22 USC §211a, "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . ." and the President had issued Executive Order 7856 promulgating passport regulations. The particular question presented here, the opinion stated, is whether a person who has received a passport may have it summarily revoked without prior notice or opportunity for a hearing. The Court rejected defendant's contention that the issuance and rejection of passports involves the conduct of foreign affairs, and therefore, are within the province of the executive and may not be interfered with by the judiciary. Judge Keech said that although the State Department must be given "wide discretion" in determining whether passports should be granted or withheld, this discretion, "although in a political matter, must be exercised with regard to constitutional rights of the citizens".

In discussing the due process question the Court quoted from *Williams* v. *Fears*, 169 U. S. 270, where the Supreme Court recognized that personal liberty includes "the right of locomotion, the right to move from one place to another, according to his inclination". Although that decision concerned freedom to move from state to state the Court believes that that principle is also applicable to travel abroad. It said that this is especially true today "when modern transportation has made all the world easily accessible and when the executive and legislative departments of our government have encouraged a welding together of nations and free intercourse of our citizens with those of other friendly countries." Judge Keech concluded that the Secretary of State does not have absolute discretion in the matter of passports, but, rather, he must exercise his powers with regard to the principles of due process and equal protection of the law.

The Court was of the further opinion that plaintiff's attack on the constitutionality of the Secretary of State's revocation of her passport raised a substantial constitutional question necessitating convocation of the three-judge court which heard this case.

District Judge Curran concurred with Judge Keech's opinion.

Circuit Judge Fahy filed a dissenting opinion on the jurisdictional ground that the case should not have been heard by the special court, but should have been processed in the routine manner through the federal district court.

Contempt . . . privilege against self-incrimination . . . witness before congressional committee did not waive his constitutional privilege against self-incrimination and need not answer questions concerning his net worth, his debts in excess of $10,000 and his total indebtedness.

■ *United States* v. *Costello*, C.A. 2d, July 3, 1952, Hand, A.N., C.J.

Defendant was convicted of ten

separate contempts of the United States Senate Crime Investigation Committee and was sentenced to eighteen months' imprisonment and fined $5,000. On appeal the judgment of convictions on four counts was reversed, although three were affirmed. Three counts of the indictment charged defendant with refusing to answer the following questions: (1) "What is your net worth?", (2) "Do you owe any sums of money in excess of $10,000 to any person?" and (3) "What is the total indebtedness, Mr. Costello?". Defendant refused to answer these questions on the ground that his answers might tend to incriminate him.

Reversing the lower court's conviction on these three counts, the Court of Appeals for the Second Circuit ruled that the privilege was validly asserted in view of the fact that the committee had described defendant as a leader of a major crime syndicate and the questions asked created "obvious income tax implications". Judge Hand said that defendant did not "waive" his privilege when he testified as to his assets and agreed to furnish a complete financial statement. *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355, were cited for the proposition that so long as testimony voluntarily given does not amount to an admission or proof of any crime a witness, by testifying, has not destroyed his privilege to answer further questions which might tend to incriminate him.

In addition, the Court ruled that the convictions on four other counts must be reversed. Each of these four counts dealt with defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that same day. When defendant made his position clear, the opinion stated, "the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions . . . the contempt was total when he stated that he would not testify."

However, the conviction on three counts was upheld, although defendant argued that he had refused to testify merely because he had acute laryngotracheitis. His refusal to testify was not wilful, he said, as witnessed by the fact that he later returned and answered all questions put to him by the committee. Judge Hand replied that the trial court's charge to the jury answers this contention because the court had charged that "The law is that a witness does not have the legal right to dictate the conditions under which he will or will not testify . . . when the defendant appeared before the Committee he was required by law to remain in attendance and not to depart . . . without leave of the Committee".

Fair Employment Practices Act . . . racial discrimination . . . Commission on Civil Rights' finding that electricians' union had discriminatorily excluded Negroes from membership because of their race upheld as not being arbitrary or unreasonable.

■ *International Brotherhood of Electrical Workers, Local No. 35* v. *Commission on Civil Rights*, Conn. Super. Ct., Hartford County, July 14, 1952, Borden, J. (Digested in 21 U. S. Law Week 2060, July 29, 1952).

After an investigation, the Connecticut Commission on Civil Rights found that an electricians' union had violated the Connecticut Fair Employment Practices Act by discriminatorily excluding two Negro electricians from membership because of their race. On appeal the Court said that although it might itself have to come to a different conclusion, the Commission's finding must be upheld as not being arbitrary, unreasonable or illegal. Although the evidence lacked "proof of overt acts directed exclusively against Negroes" the Court said that because of the difficulty of proving discrimination "greater latitude" must be permitted in these cases "to draw inferences from words or deeds than in cases where overt acts need to be established". In the instant case the Commission could have inferred discrimination from evidence that the union had never admitted a Negro to membership, that it had procured the reduction of a Negro electrician to janitor when his employer signed a union-shop contract and that it had discouraged the filing of applications for membership by Negroes.

The union claimed that the Negroes who filed the present complaint had not complied with a union rule requiring that membership applicants be sponsored by an employer. However, the opinion noted that the applicants cannot get into the union because they cannot get jobs and cannot get jobs because they cannot get into the union. This "vicious circle", the Court declared, would permit both the employers and the union to plead freedom from discrimination while practicing it.

Labor Law . . . refusal of National Labor Relations Board's General Counsel to issue unfair labor practice complaint held not "final order of the Board" reviewable by federal circuit court under § 10 (f) of Labor Management Relations Act.

■ *Manhattan Construction Co., Inc.* v. *National Labor Relations Board*, C.A. 10th, July 25, 1952, Bratton, C.J.

A construction company filed with the National Labor Relations Board a charge that a carpenters' union was engaged in a jurisdictional dispute with a hod carriers' union and was guilty of an unfair labor practice. However, prior to the filing of the charge the dispute had been submitted to a joint board for decision and so the Board advised the construction company that no proceedings were warranted and it would not issue a complaint. The company appealed to the General Counsel of the Board but the Counsel sustained the Board's action. A petition for review of the Board's order was then filed in the Court of Appeals.

The single question presented, the Court stated, was whether the Board's refusal to issue a complaint was subject to review. Section 10 (f) of the Labor Management Relations

Act gives a court of appeals jurisdiction to review only a "final order of the Board" and that phrase, the opinion noted, refers solely to an order either dismissing a complaint or directing a remedy relating to an unfair labor practice. The Board argued that its action was not such a final order and the Court agreed, stating that under § 3 (d) of the Act the General Counsel has final authority with respect to the investigation of charges and the issuance of complaints. It observed that no provision for judical review of his action respecting such matters is made. The charge filed by the construction company was not a complaint within the meaning of the Act, the opinion noted, since its function was merely to set in motion the machinery for an inquiry to determine whether a complaint should be issued. Therefore, the Court concluded that no final order was entered which the company could bring here for review.

Labor Law . . . lockouts ruled illegal . . . discharge of employees after they went on strike held unfair labor practice . . . even if sole purpose of lockout is to break impasse in bargaining employers' lockout violates National Labor Relations Act.

■ *In re Morand Bros. Beverage Co. et al.*, Case No. 13-CA-50, NLRB, July 6, 1952.

In 1950, the National Labor Relations Board found that members of a wholesale liquor employers' association (petitioners) had discriminated against their salesmen employees by dismissing them after they had struck against an individual member of the association. On petition for review of the Board's decision the United States Court of Appeals for the Seventh Circuit remanded the case with directions to the Board to make further findings on three points: (1) whether the employers had intended to discharge their salesmen temporarily or permanently, (2) whether, if found to be a temporary lockout, it violated the Act and (3) whether the employees would be entitled to back pay if they were permanently discharged, 36 A.B.A.J. 1031, December, 1950, 37 A.B.A.J. 772, October, 1951.

After carefully weighing all the evidence bearing on the first issue, the Board was persuaded that the evidence preponderated in favor of a finding that the employers had intended to permanently discharge their employees, rather than temporarily lay them off. The salesmen had called a strike after an impasse in negotiations for renewal of a collective bargaining agreement had been reached. Petitioners then notified them of their discharge. The Board said that at the original hearing in the case petitioners had characterized their action as a "discharge" and did not argue that it was a temporary lay off until the remand hearing when they were put on notice by the Court of Appeals that their action might then be considered lawful. The Board concluded that the mass discharge was in reprisal for the strike, that it was calculated to discourage membership in and destroy the salesmen's union and that it thereby violated §§8(a)(1) and 8(a)(3) of the National Labor Relations Act.

The second issue the Board was directed to consider was whether, if the severance was temporary, it was made for the purpose of interfering with or coercing the employees in the exercise of their rights guaranteed by §7 of the Act, or, rather, did it represent a legitimate exercise of petitioners' economic remedies. Having found that the severance was not temporary, the Board noted that it was not strictly necessary to consider this issue and Chairman Herzog dissented from his colleagues' action in passing upon it at all. However, the majority of the Board found that even assuming that the severance was temporary, it was not a legitimate exercise of petitioners' economic power. The majority reached this conclusion for two reasons: first, because petitioners' clear purpose in dismissing their employees was not merely to break the impasse in bargaining, but to punish the employees for striking; second, because even if the sole purpose of the layoff was to break an impasse in bargaining, that fact would not privilege the lockout. The Board admitted that there is an "aura of fairness" surrounding the argument that the right of an employer to lockout his employees is a necessary corollary of the right of the employees to strike. However, it pointed out that to equate lockouts with strikes would give the employer the right to lockout his employees in order to defeat organizational activities, to assist a company-dominated union, to punish them for past strike activity, to force the withdrawal of bargaining demands even before an impasse is reached, or for other reasons which would clearly violate the various provisions of §8(a) of the Act.

However, the Board pointed out that when a genuine deadlock has been reached after bargaining in good faith the employer may put into effect the terms he has offered and, also, the law does not prohibit an employer from closing a plant for genuine economic or other reasons not connected with the union activities of employees.

The Board further found that a back pay award would effectuate the policies of the Act.

Labor Law . . . employment contract . . . company's agreement to retain members of union in its employ for one year at guaranteed wage renders company liable for wages lost by union employees after company discontinued operations for business reasons.

■ *Hudak* v. *Hornell Industries, Inc.*, N. Y. Ct. of App., June 5, 1952, Froessel, J., 106 N.E. 2d 609.

Suing as third-party beneficiaries plaintiffs sought damages for breach of a contract made between defendant employer and the union to which plaintiffs belonged. The union and defendant had entered into an agreement which provided, among other things, that the company agreed "to continue to employ"

its union employees "now presently in the employ of the Company during the period covered by this Agreement [one year]" at a guaranteed wage. However, before the one year period had expired the company, although not bankrupt or insolvent, discontinued its business and discharged plaintiffs.

The Court read the contract as being something more than the ordinary collective bargaining agreement providing for employment of union labor generally. It believed that the contract constituted an "unequivocal promise" by the employer to employ its union workers for a fixed period and a stipulated compensation. Judge Froessel emphasized the fact that the agreement specifically provided for the employment of designated individual employees, the union members presently employed, rather than for the hiring of union men at large.

Although defendant argued that the contract lacked mutuality because each employee had the right under the contract to quit his job on giving one week's notice, the Court stated that the employer also derived benefits from the contract such as the union's promise to stop unauthorized work stoppages.

Labor Law . . . refusal to bargain . . . employer's insistence in collective bargaining negotiations on unilateral control of all employment conditions held unlawful refusal to bargain in good faith.

■ *Majure, d/b/a/ Majure Transport Co.* v. *National Labor Relations Board,* C.A. 5th, July 18, 1952, Russell, C.J.

The Court in this case affirmed a ruling of the National Labor Relations Board holding that a company had committed an unfair labor practice by refusing to bargain in good faith with the union representatives of its employees. At collective bargaining meetings between the union and company each submitted a proposed contract unacceptable to the other. The employer wished to reserve to itself unilateral determination of all significant features of employment—wages, hours and working conditions—and indicated no willingness to modify any of its terms. The union, on the other hand, acknowledged that it did not expect to secure acceptance of all the terms of its proposal but had put it forth merely as a basis for negotiation.

The Court ruled that the Board's finding was supported by substantial evidence, but cautioned that it should not be construed to hold that the mere original submission of a counterproposal was sufficient to authorize the finding of bad faith since the entire circumstances of the case must be considered. The opinion remarked that the statutory duty to bargain in good faith does not require an employer to accept a union's proposal or make any concessions and Judge Russell also admitted that the dividing line between the right to stand firm and the obligation to bargain in good faith is "frequently difficult of ascertainment and establishment". However, Judge Russell observed that "judicial ingenuity has devised but one standard, or test, which, recognizing the problem, yet seeks to insure reconciliation of privilege and obligation. This rule requires fair appraisal of the circumstances and the particular facts of the particular case". Applying that rule in this case he found that although the employer had met with the union and had engaged freely in bargaining discussions, the "particular facts" supported the Board's finding that the employer "did not approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties".

Landlord and Tenant . . . duty to make repairs . . . tenant held responsible for keeping rented property in good condition.

■ *Bowles* v. *Mahoney,* C.A.D.C., July 10, 1952, Miller, C.J.

This case involved the question of who is responsible for keeping rented property in safe repair—the tenant or the landlord? The tenant's nephew, a child, was injured from the collapse of a retaining wall on the rented premises and through his mother as next friend he brought this tort action against the owner of the property. Plaintiff's theory was that, having constructed the wall, defendant landlord was under a duty to maintain it in a safe condition which she had negligently failed to do. The lower court found for plaintiff and awarded $2,500 damages.

On appeal a two-judge majority ruled that it was the duty of the tenant to keep the wall in good condition. Judge Miller stated that defendant was not guilty of fraud by failing to disclose at the time of leasing defects in the wall of which she had knowledge, she had not agreed to repair and she had conveyed the entire possession and control of the premises to her tenant. The tenant assumed whatever risks there might have been in occupying them. The opinion concluded that the trial judge had erred in denying defendant's motion for a directed verdict at the end of plaintiff's evidence.

Judge Bazelon dissented, stating that "the exalted position which the landlord held at early common law is discordant with the needs of a later day". He noted that in a great many states the common law rule has been changed by statutes based upon a recognition of the social and economic need for shifting the distribution of the risk. Landlords are possessed of better means to discharge the burden, he declared, and added: "I think the rule is an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to 'the felt necessities of [our] time.' I would therefore discard it and cast the presumptive burden of liability upon the landlord".

Treaties . . . judicial review . . . federal district court holds it has power to review State Department's finding that treaty between United States and Serbia still exists as treaty between United States and Yugoslavia.

■ *Artukovic* v . *Boyle,* U.S.D.C., S.D.

Calif., July 14, 1952, Hall, D.J. (Digested in 21 U.S. Law Week 2059, July 29, 1952).

The principal question involved in this case was whether or not the United States' 1902 Treaty of Extradition with the Kingdom of Serbia is still in existence between the United States and Yugoslavia. The State Department had announced that the treaty is still in effect but petitioner, whom Yugoslavia sought to extradite, contended that Yugoslavia is an entirely different foreign country from the Kingdom of Serbia and the State Department had not complied with the constitutional requirement that treaties with foreign states be submitted to the Senate. It was contended by respondent that the determination of whether a treaty is in existence cannot be reviewed by the courts since it is a political question to be determined exclusively by the executive department.

Relying upon *Marbury* v. *Madison*, 1 Cranch 137, the Court ruled that the question of whether or not a treaty exists is a judicial question to be decided by the courts. Judge Hall said that a treaty when made is a law and "the power to determine whether a law exists, i.e., whether or not it is constitutional, and to interpret it, is a judicial power and rests solely in the courts with all the safeguards of review and does not lodge in the *ipsi dixit* of the Executive Department of the government or any branch thereof". He said that any other conclusion would fly in the face, not only of the plain words of the Constitution, but also of the fundamental constitutional concept of three separate and autonomous branches of the Government. He could not accept a construction which would nullify the provision of the Constitution requiring the Senate's consent to treaties.

Judge Hall then decided that the treaty is not in effect. He took judicial notice of the history of Croatia and other Balkan countries and decided that that history reveals that the boundaries and territories of those countries have changed so frequently that it is impossible to say that Yugoslavia is merely a continuation of the existence of the old Kingdom of Serbia.

Further Proceedings in Cases Reported in This Division.

■ The following action has been taken in the United States Court of Appeals for the District of Columbia Circuit:

AFFIRMED, July 16, 1952: *Ramspeck et al.* v. *Federal Trial Examiners Conference et al.*—Civil Service (38 A.B.A.J. 407; May, 1952).

■ The following action has been taken by the National Labor Relations Board on remand from the United States Court of Appeals for the Seventh Circuit (see review *supra*):

ORIGINAL ORDER REAFFIRMED, July 6, 1952: *In re Morand Bros. Beverage Co. et al.*—Labor Law (36 A.B.A. J. 1031, December, 1950; 37 A.B.A.J. 772, October, 1951).

Additional Recent Decisions of Interest.

■ *National Labor Relations Board* v. *Anchor Rome Mills, Inc.*, C.A. 5th, 197 F. 2d 447.

The National Labor Relations Board has the power, even before a complaint has been filed, to issue a subpoena *duces tecum* to compel employer to produce books and records in aid of investigation.

■ *United States* v. *Bar Association of District of Columbia*, C.A.D.C., 197 F. 2d 408.

Bar association, which was private corporation, and which extended free use of its library and reading rooms to Attorney General of United States and other government counsel and members of court, and which permitted all members of Bar in good standing, whether or not they were members of Association, to use library facilities upon payment of small fee, was not, by fact that it was permitted to maintain library in District Court building without payment of rent, a recipient of federal aid to the extent that it could not exercise free choice in selection of its members.

■ *Perry* v. *Moskin Stores*, Ky., 249 S.W. 2d 812.

The mailing for advertising purposes of a personalized post card containing statement "Please call WAbash 1492 and ask for Carolyn" did not constitute an invasion of plaintiffs' right of privacy, although his home was allegedly wrecked as a result, in view of fact that contents of card could not be reasonably construed to have a salacious meaning.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The importance of the conference committee in congressional procedure is apparent to all students of the problem but there is little general understanding of how such groups operate. The following article by the author of *How Our Laws Are Made* serves to clarify the matter.

Conference Procedure in Congress

By Charles J. Zinn, Law Revision Counsel,
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■ It is basic to our federal legislative process that before becoming law a bill or joint resolution must have been passed in precisely the same form by both Houses of the Congress. Any change, however trivial, in language, punctuation or spelling, made after the measure has passed the House in which it originated, defers final passage until all differences are resolved. That is a fundamental principle deriving from the legislative equality of the two Houses and, of course, essential for the certainty and definiteness that our laws must have.

When a measure that has originated in the House of Representatives is amended by the Senate (or vice versa) it is returned to the former body with a message stating that it has been passed with amendments in which the concurrence of the other body is requested.*

Upon their return to the House the official papers relating to the amended measure are placed upon the Speaker's table to await House action on the Senate amendments. If the amendments are of a minor or noncontroversial nature the chairman of the Committee that originally reported the bill—or any member—may, at the direction of the Committee, ask unanimous consent to take the bill with the amendments from the Speaker's table and agree to the Senate amendments. At this point the clerk reads the title of the bill and the Senate amendments. If there is no objection the amendments are then declared to be agreed to, and the bill is ready to be enrolled for presentation to the President. Lacking such unanimous consent, bills that do not require consideration in the Committee of the Whole are privileged and may be called up from the Speaker's table by motion for immediate consideration of the amendments, a simple majority being necessary to carry the motion and thereby complete action on the measure.

Request for a Conference

If, however, the amendments are substantial or controversial the member may request unanimous consent to take the bill with the Senate amendments thereto from the Speaker's table, disagree to the amendments and request a conference with the Senate on the disagreeing votes of the two Houses. If there is no objection to this request, the Speaker thereupon appoints the managers (as the conferees are called) on the part of the House and a message is sent to the Senate advising it of the House action. The Speaker customarily, but not necessarily, follows the suggestions of the chairman of the committee in charge of the bill in designating the managers on the part of the House from among the members of the committee. The number, as fixed by the Speaker, is frequently three, consisting of two members of the majority party and one of the minority, but may be greater on important bills. Representation of both major parties is an important attribute of all our parliamentary procedure but, since in the case of conference committees it is rather more important that both sides of the pending differences be considered, all the conferees may be of the same political party so long as they represent both points of view on the question.

If the Senate agrees to the request for a conference a similar committee is appointed by unanimous consent by the presiding officer of the Senate. Both political parties or both sides of the pending question are represented on the Senate conference committee also, but the Senate committee need not be the same size as the House committee.

The request for a conference can be made only by the body in possession of the papers. Occasionally the Senate, anticipating that the House will not concur in its amendments, makes the request for a conference at the time of messaging the papers back to the House upon passage of the bill with amendments by the Senate. This practice serves to expedite the matter because several days' time may be saved by the designation of the Senate conferees before returning the bill to the House. The matter of which body requests the conference is not without additional significance inasmuch as the one asking for the conference acts last upon the report to be submitted by the conferees.

Authority of Conferees

Although the managers on the part of each House meet together as one committee they are in effect two separate committees, each of which votes separately and acts by a majority vote. For this reason the number of the respective managers is immaterial.

The conferees are strictly limited in their consideration to matters in disagreement between the two Houses. Consequently they may not strike out or amend any portion of the bill which was not amended by the Senate. Furthermore, they may not insert new matter that is not

*For convenience and uniformity this discussion is addressed to the practice governing House bills that have been amended by the Senate.

germane to the differences between the two Houses. Where the Senate amendment revises a figure or an amount contained in the bill, the conferees are limited to the difference between the two numbers and may not increase the greater nor decrease the smaller figure. Neither House may alone, by instructions, empower its managers to make a change in the text to which both Houses have agreed, but the managers for both bodies may be given such authority by concurrent resolution adopted by a majority of each House.

However, where the Senate amendment to the bill strikes out all after the enacting clause and inserts a substitute bill for the House provisions the conferees have the entire subject before them. This is so even though particular sections of the substitute may be identical to sections in the version of the bill as it passed the House. In the case of an amendment in the nature of a substitute it is in order for the conferees to report an entirely new bill on the subject in disagreement, but they may not include in the report matter not committed to them by either House. They may, however, include in their report in any such case matter which is a germane modification of subjects in disagreement.

Meetings and Action of Conferees

The meetings of the conferees are customarily held in executive session on the Senate side of the Capitol, with only the conferees and staff members or other expert assistants in attendance, although in rare instances members or other persons have been admitted to make arguments.

There are generally three forms of recommendations available to the conferees when reporting back to their bodies, *viz:*

1. That the Senate recede from all (or certain of) its amendments;

2. That the House recede from its disagreement to all (or certain of) the Senate amendments and agree thereto; and

3. That the House recede from its disagreement to all (or certain of) the Senate amendments and agree thereto with amendments.

In many instances the result of the conference is a compromise growing out of the third type of recommendation available to the conferees. The complete report may, of course, be comprised of one, two or all three of these recommendations with respect to the various amendments. Occasionally the conferees find themselves unable to reach an agreement with respect to one or more amendments and so report back a statement of their inability to agree on those particular amendments. These may then be acted upon separately. This partial disagreement is, of course, not practicable where the Senate strikes out all after the enacting clause and substitutes its own bill which must be considered as a single amendment.

If they are unable to reach any agreement whatsoever the conferees report that fact to their respective bodies and the amendments are in the position they were before the conference was requested. New conferees may be appointed in either or both Houses. In addition, the Houses may instruct the conferees as to the position they are to take. The practice of instructing the original conferees at the time of their appointment is rarely used today.

After House conferees on any bill or resolution in conference between the two bodies have been appointed for twenty calendar days and have failed to make a report, the House rules provide for a motion of the highest privilege to discharge the House conferees and to appoint new conferees, or to instruct them. Further, during the last six days of any session it is a privileged motion to move to discharge, appoint or instruct House conferees after House conferees shall have been appointed thirty-six hours without having made a report.

Conference Reports

When the conferees, by majority vote of each group, have reached complete agreement (or find that they are able to agree with respect to some but not all amendments) they embody their recommendations in a report made in duplicate which must be signed by a majority of the conferees appointed by each body. The minority portion of the managers have no authority to file a statement of minority views in connection with the report. The report is invariably printed in the House and occasionally in the Senate. An additional detailed statement by the managers on the part of the House, sufficiently explicit to inform the House what effect such amendments or propositions will have upon the measure, must accompany the report and is also printed. The engrossed bill and amendments and one copy of the report are delivered to the body which is to act first upon the report, namely, the body which had agreed to the conference requested by the other.

In the Senate the presentation of the report is always in order except when the Journal is being read or a question of order or motion to adjourn is pending, or while the Senate is dividing; and when received, the question of proceeding to the consideration of the report, if raised, is immediately put and is determined without debate. The chairman of the committee usually makes an oral statement similar to the written statement required by the rules of the House of Representatives. The report is not subject to amendment in either body and must be accepted or rejected as an entirety. If the Senate, acting first, does not agree to the report it may by majority vote order it recommitted to the conferees. When the Senate agrees to the report its managers are thereby discharged and it then sends the original papers to the House of Representatives with a message advising that body of its action.

A report that contains any recommendations which are not germane to the differences between the two Houses is subject to a point of order in its entirety. Any change in the text as agreed to by both

Houses renders the report subject to the point of order and the matter is before the House *de novo*.

The presentation of the report in the House of Representatives is always in order, except when the Journal is being read, while the roll is being called, or the House is dividing on any proposition. The report is considered in the House and may not be sent to the Committee of the Whole on the suggestion that it contains matters ordinarily requiring consideration in that committee. The report may not be received by the House if no statement accompanies it. It is not in order, except during the last six days preceding the end of a session, to consider the report until it and the accompanying statement have been printed in the Congressional Record. Debate on the report is limited under the one-hour rule during which the previous question may be ordered at any time. If the previous question is ordered without debate, the forty-minute rule applies, allowing twenty minutes to each side. If the House does not agree to the report, the report may not be recommitted to the conferees since the Senate has already agreed to it and discharged its managers.

Where the report discloses an inability of the conferees to reach complete agreement the amendments of the Senate in disagreement may be voted upon separately and may be adopted by a majority vote after the adoption of the report itself as though no conference had been had with respect to those amendments. The Senate may recede from all amendments, or from certain of its amendments, insisting upon the others with or without a request for a conference with respect to them. If the House does not accept the amendments insisted upon by the Senate the entire conference process begins again with respect to them.

Custody of Papers

The custody of the original official papers is important in conference procedure inasmuch as either body may act only when in possession of the papers. As indicated above the request for a conference may be made only by the body in possession. The papers are then transmitted to the body agreeing to the conference and by it to the managers of the House which asked. The latter in turn carry the papers with them to the conferences and at its conclusion turn them over to the managers of the House that agreed to the conference. The latter delivers them to their own House, which acts first on the report and then messages the papers to the other House for final action on the report.

Each group of conferees, at the conclusion of the conference, retains one copy of the report which has been made in duplicate, and signed by a majority of the managers of each body—the House copy signed first by the House managers and the Senate copy signed first by its managers.

Upon final agreement by both Houses the bill is enrolled in its final form under the supervision of the enrolling clerk of the House in which it originated; and when signed by the Speaker and the President of the Senate (with a certificate of the Clerk of the House or the Secretary of the Senate showing where the bill originated) it is ready to be presented to the President of the United States for his action.

Are We Neglecting Constitutional Liberty?

(Continued from page 820)

ing the answers. If we fail to do so, we jeopardize, it seems to me, the things which mean the most to us.

There is nothing novel about the problem; it is as old as the democratic process; it is the ancient problem of protecting the rights of the individual without affecting adversely the essential functions of Government.

Many solutions have been suggested. But there will be no solution unless the people are aroused. As I have said, we can be sure that a free people will insist upon the correction of any practice which seems to jeopardize their basic institutions. But it is the function of the Bar to warn the people of the dangers. This is an area in which, by reason of training and by tradition, we have a special competence and a compelling obligation. The obligation cannot be performed by talking among ourselves, or by writing articles in law reviews and bar association journals. We must get word to the people.

It will not be a popular cause; but the practice of the law is not a contest for popularity. Lawyers are more than mere craftsmen of their trade; they are concerned with the administration of justice. And "lawyers in the past have risked the obloquy of the uninformed to protect the rights of the most degraded".[14] Thirty years ago twelve distinguished lawyers, led by Dean Roscoe Pound, agreed as a public service to examine the deportation raids of the then Attorney General Palmer. In these words they addressed the American people:[15]

> Free men cannot be driven and repressed; they must be led. Free men respect justice and follow truth, but arbitrary power they will oppose until the end of time. There is no danger of revolution so great as that created by suppression, by ruthlessness, and by deliberate violation of the simple rules of American law and American decency.

In the spirit of those inspiring words: Let us honor the great traditions of the law. Let us recognize the call of our time to a sense of our own mission and responsibility. Let us do our part to justify the expectation of plain people for fair play. Let us re-earn the noble title of "ministers of justice". Let us answer the call to leadership!

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14. Quoted from letter of President Truman to Arthur J. Freund, Chairman of the Section of Criminal Law of the American Bar Association, dated September 1, 1951, appearing in *Bar Bulletin of the New York County Lawyers Association*, November 1951 (Volume 9, No. 3), at page 33.

15. Quoted by Philip L. Graham, Publisher of the Washington Post, in "A Publisher Looks at the Law", *The Record of The Association of the Bar of the City of New York*, January, 1952 (Volume 7, No. 1), at pages 25-26.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.**

Prize Money and Fellowship Awards Taxed

■ The American Bar Association has always been directly concerned with the taxation of prize money because of its annual Ross Essay Contest. In 1945, the United States Court of Appeals for the District of Columbia Circuit held that the 1939 award of $3,000 was a nontaxable gift rather than taxable compensation. *McDermott* v. *Commissioner*, 150 F. 2d 585 (D.C. Cir. 1945). In 1949, the Bureau of Internal Revenue announced that it would not follow that decision for years after 1948, I. T. 3960, 1949-2 Cum. Bull. 13, and now its position has apparently been sustained by reason of the recent decision of the United States Supreme Court in *Robertson* v. *United States*, 343 U.S. 711 (June 2, 1952).

The *Robertson* case was taken up by the Supreme Court because of a conflict between the Tenth Circuit's decision and the *McDermott* decision. Robertson had submitted to a musical contest a symphony which he had composed long before the contest was announced. The contest was established by a music-loving philanthropist. The contest terms were that the composer would grant the Detroit Orchestra, Inc., all motion picture synchronization rights, all mechanical rights with respect to phonograph recordings, electrical transcriptions and music rolls, the exclusive right to authorize the first performance in countries whose citizens could enter the contest, and the right to designate the publisher. The composer otherwise remained the owner of the composition. Robertson won the $25,000 first prize. Mr. Justice Douglas disposed of the contention that the prize money was a nontaxable gift by saying shortly that the discharge of a legal obligation—payment of money pursuant to a contract—is in no sense a gift, and that it was irrelevant that the donor derived no economic benefit. "The case would be different if an award were made in recognition of past achievements or present abilities, or if payment were given not for services . . . but out of affection, respect, admiration, charity or like impulses."

The *Robertson* case has been held to require reversal of a District Court decision in a case involving an award by a foundation for a paper dealing with improved methods of arc-welding, even though the foundation acquired no rights to the paper or its publication. *United States* v. *Amirikian*, —F. 2d— (4th Cir., June 16, 1952). The court clearly felt the enforceability of the contract created by the contestant's acceptance of the sponsor's offer, the point emphasized by the Supreme Court in its *Robertson* opinion, was sufficient to result in tax. The Tax Court had previously held similar prize winners taxable, in spite of the donors' public-spiritedness or lack of profit motive, since the donors received what they had bargained for. *Herbert Stein*, 14 T.C. 494 (1950); *Frederick W. Waugh*, 9 T.C.M. 309 (1950).

There may be little quarrel with the Supreme Court as to prize awards where contestants enter into a competition, however worthy the competition. Presumably, Nobel Prizes remain nontaxable even though some winners journey to Sweden to deliver an address. Other awards merely acknowledging the outstanding qualities of the recipient would seem exempt. But the *Robertson* reasoning may well play havoc with fellowship awards, which are already under attack.

A ruling issued last fall caused considerable consternation to foundations and universities, because it held taxable the kind of fellowship awards previously thought nontaxable. I.T. 4056, 1951-2 Cum. Bull. 8. There, the Bureau ruled upon four individual situations, holding the awards taxable even though the foundation did not originate the fellowship programs, did not receive any rights in the work produced, and did not require progress reports. The Bureau stated that since the foundation made its fellowship grants with the expectation, if not with the requirement, of results, the recipients were taxable. "If a grant or fellowship award is made for the training and education of an individual, either as a part of his program in acquiring a degree or in otherwise furthering his educational development, no services being rendered as consideration therefor, the amount of the grant or award is a gift which is excludable from gross income. However, when the recipient of a grant or fellowship applies his skill and training to advance research, creative work, or some other project or activity, the essential elements of a gift . . . are not present, and the amount of the grant or fellowship is includible in the recipient's gross income."

This ruling has created difficulties for foundations and universities attempting to encourage and support worthy activities and individuals. And now the *Robertson* decision has given the ruling a firmer basis, for it seems difficult to avoid the conclusion that in these situations there is some kind of *quid pro quo* resulting in an enforceable legal obligation. At the very least, fellowship holders impliedly agree to continue doing what they are doing in return for the money, and more often they agree to do something different or something more than they were previously doing. That is, they usually agree to work in a specified field at a certain kind of project, even

though they are not held to the production of results; this is a fairly substantial kind of understanding. There often are also present more specific undertakings, such as commitments to submit papers or reports or to take certain courses of training. The *Robertson* opinion seems to give the Bureau strong support for taxing such fellowship awards. Although scholarship grants to candidates for degrees are stated, in I.T. 4056, *supra*, to be nontaxable, a close search could probably disclose some kind of condition in those awards also.

The narrow approach of Justice Douglas in the *Robertson* case, establishing as a touchstone the mere presence of a contractual obligation, strangely contrasts with the usual emphasis of the Supreme Court on substance and reality, rather than on form or technicalities. Certainly, the grasp for revenue has intensified the financial problems of nonprofit institutions in advancing the public welfare, because they now probably must also supply tax money to fellowship recipients.

OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

■ The following article was prepared by Frederick D. Lewis, Jr., Professor of Law in the Drake University School of Law, Des Moines, Iowa, and National Chairman of the Junior Bar Conference Committee on Law Students. Assisting Professor Lewis in the work of this committee are James L. Bennett, Des Moines, Iowa, Executive Vice Chairman; David C. Bastian, Washington, D. C., James L. DeSouza, Phoenix, Arizona, Abner V. McCall, Waco, Texas, Martin J. Purcell, Kansas City, Missouri, and Edward D. Re, Brooklyn, New York, Vice Chairmen; Thomas Flynn, Chicago, Acting Director of the ALSA; James M. Spiro, Chicago, Consultant; and Wiley E. Mayne, Sioux City, Iowa, Council Adviser.

Des Moines Register & Tribune

FREDERICK D. LEWIS, JR.

They Shall Stand and Be Counted

■ Now terminating its third year, the American Law Student Association has well over 30,000 law student members representing over 100 of the nation's 124 approved law schools. Conservatively stated, the growth and development of this organization has been phenomenal. Space does not permit a chronicle of the history of this organization but every lawyer, as a matter of professional responsibility, should read the report on the association prepared for the Survey of the Legal Profession by James M. Spiro, first Director of the American Bar Association Law Student Program, entitled, "The American Law Student Association: Developing Future Leaders of the Bar", appearing in the May, 1952, issue of the AMERICAN BAR ASSOCIATION JOURNAL. In this report Mr. Spiro describes the American Law Student Association as a young giant rising among the bar associations of the United States. This is a fact.

Sponsored by the American Bar Association and the Junior Bar Conference, the American Law Student Association has a membership strength well over half that of the American Bar Association. It is permanently and effectively organized on both the national and local levels. As Mr. Spiro's report shows, it is not in any sense a "paper organization". Immeasurable benefit to the organized Bar will be derived from this organization.

In the 1952 annual report of the Chairman of the Junior Bar Conference Law Student Committee, the following recommendation was made:

"That every effort be made to encourage local and state bar associations and their members to promote, assist, and develop the Student Bar Associations within the schools and, to the degree practicable, participate in mutual projects with them."

This recommendation is further developed in the report by the following paragraph:

Inasmuch as most law student activity of the type the bar is seeking to encourage is necessarily on a local level, this committee feels that the primary obligation and purpose of this committee must be to promote and encourage interaction between the local and state bar groups and the student groups. This is where beneficial training can best be effected. The local and state bar groups have not met this obligation. An all-out campaign is needed to inform our state and local groups of this obligation and to encourage their assistance and cooperation. The state and local bar groups must be alerted to the very valuable assistance they can now secure from these local student groups who are more than willing to help where practicable, and they must become aware that the benefit to the organized bar will be immeasurable when these students graduate into the bar, acquainted with its organizations, trained in its objectives, and disciplined to its standards.

There can be little doubt that the

members of the American Law Student Association will stand and be counted in the affairs of the organized Bar of tomorrow. There is ample evidence to show that attitudes are formed at an early stage and seldom change. Psychologists, religion experts, politicians, educators and many others testify to this. The organized Bar is no exception. Membership records of the American Bar Association show that a very low percentage of lawyers with one to five years' experience are actively participating in the affairs of the organized Bar in spite of all inducements otherwise. The better law schools are doing all they can to instill principles of ethics, justice and responsibility in the minds of the embryonic lawyer, but their effectiveness is limited. Students also learn by what they observe. It should be noted that in the last few years the apprenticeship method of training the lawyer has been almost wholly replaced by formal education. One of the advantages of the apprenticeship training was an awareness on the part of the student from the beginning of his training that he was a member of a professional community with consequent responsibilities. Formal education leaves a gap despite the best efforts of the schools.

The typical law student has few, if any, professional contacts and professional acquaintances. His observation may be limited, as is often the case with laymen, to the sensational lawyer. If the reader will cast back to his own experience as a student, he will recall that the lawyer he knew became a model of his professional ambition. All too often this lawyer may have been made of baser metal. The student must realize that the Bar is a responsible professional colony and that integrity and ethics are the passwords to true success in the profession. Student professional contacts and acquaintanceships must be at a maximum. Interaction between the student organizations and the local bar organizations is imperative.

There is an old Persian fable about the wise and wealthy man who employed a young bookkeeper. The bookkeeper agreed to work for ten gold pieces if at the end of his term the employer would give him the secret to success. When his work was finished the young man demanded his due, asking how he could become successful with *his* money. The employer informed him that the first secret to success was that the young man must learn that only one of the gold pieces was truly his; the rest belonged to the bootmaker, the ironmonger and the other merchants who had served him.

It is shortsighted indeed not to recognize that the organized Bar has obligations that extend far beyond immediate benefits to its members. It holds the future of the profession in trust. The paramount concern of most great men has been the welfare of posterity. Most of the leaders of the organized Bar have recognized this truth. On the national level the American Bar Association and the Junior Bar Conference have been unstinting in their co-operation.

The contributions of the officers of the American Bar Association and the Junior Bar Conference, the Board of Governors, the Circuit representatives, the committee chairmen, and many others would fill several pages. On the local level the record is quite different. The areas in which students have been welcomed into local bar affairs can be counted on one hand.

The state and local bar associations must take the initiative and contact the local student groups, volunteering their interest, assistance, co-operation and advice. The students must be made to see that the local Bar is interested in their progress as professional persons.

In the few cases in which the local bar organizations have accepted their responsibility toward the student groups, the program has been enthusiastically endorsed by student and bar groups alike. Potential areas of interaction are:

1. Associate memberships in the local bar organizations;
2. Bar sponsored clinics at the law schools; *e.g.*, lectures, clinics on ethics, office management, local practices and the conduct of litigation;
3. A student bar committee representative should sit with the corresponding local bar committee and, inasmuch as most student bar groups have committees similar to those of the local bar organizations, joint surveys, research projects, reports, conferences or other activities can be easily facilitated;
4. Student participation in professional institutes, workshops and lecture programs;
5. Student participation in appropriate social functions and informal gatherings;
6. The student groups should be put on the local bar mailing list.

Real and practical benefits will accrue to the local bar association which invites student participation in its affairs, among which are the following:

1. The lawyer will have an opportunity to select associates from a large number of students with whom he is personally acquainted, rather than choosing his helpmate on the basis of a limited and often deceiving interview;
2. Membership in local organizations will undoubtedly be increased because of the continued interest of the student in bar affairs upon his graduation into the profession;
3. Obvious advantages will flow from the fact that newly employed graduates will be better acquainted with the local lawyers and their problems;
4. The student organizations and their known enthusiasm will provide not only a stimulus but a staff and in many cases the student groups will undertake much of the leg work in the various projects;
5. New members of the Bar will have a sense of professional discipline;
6. The student, upon graduation, will have a much clearer picture of the practice, and the prob-

lem of the vacillating graduate will be diminished.

But these advantages are only fragmentary. The true beneficiary of this program of interaction will be the organized Bar of tomorrow, when these students graduate into the Bar, acquainted with its organizations, trained in its objectives and disciplined to its standards.

This obligation to the American Law Student Association is imperative. As a former Chairman of the Junior Bar Conference Law Student Committee, Charles Joiner, said in his committee report to the Junior Bar Conference at its seventeenth annual meeting, "We have asked them not to slight the organized bar. We must take all steps possible to see that they do not feel slighted!"

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

Revised Draft Covenants on Human Rights

■ In a decision taken early this year at its session in Paris, the U.N. General Assembly reversed its previous stand with regard to the drafting of an international covenant on human rights—a project which has been under way since 1947. Whereas it had formerly taken the view that economic and social rights should be lumped together in one instrument with civil and political rights, the Assembly voted on February 5, 1952, that the U.N. Human Rights Commission be requested to prepare two separate drafts: one on civil and political rights and one on economic, social and cultural rights.

At a nine-week session in New York from April 14 to June 13, the Human Rights Commission undertook to divide its earlier draft into two parts in accordance with the changed views of the General Assembly. The Commission was not able, however, to finish its work of revision; and before adjourning it decided to seek from the Economic and Social Council (to which body it is technically responsible) instructions which would permit the Commission to complete its task at its 1953 session and which would postpone consideration of the drafts by the Council and the Assembly until after that time.

As was the case with the single draft covenant previously prepared, the two instruments now in hand are in the form of treaties designed to create binding international obligations on the states which become parties. The documents would be opened to signature by states after receiving final approval from the General Assembly, and would come into force among the ratifying states as soon as twenty ratifications had been received by the Secretary General of the United Nations. States not ratifying would not be bound.[1]

It may be noted that there is no provision at present in the drafts dealing with the effect of a ratification with reservations. Failure to cover this point might well raise difficult questions in the future as to precisely what states were bound and what was the extent of their obligations. This problem has already been a matter of difficulty in connection with the Genocide Convention, and was the subject of an advisory opinion by the International Court of Justice. The Court there ruled that each state party to the convention might determine for itself the effect to be given to ratifications with reservations by other states—a principle which would seem not wholly satisfactory for general application.[2]

The Commission did not consider at its 1951 session the inclusion of a special article in the two drafts governing their application in federal states. In association with Australia and India, the United States submitted a new proposal on this point, which no doubt will receive attention at the next session. As submitted, the proposal would impose on a federal state, with respect to all matters falling within federal jurisdiction under its constitutional system, the same obligations under the covenants as those of any other state party: but as to matters outside of federal jurisdiction, the federal state would be obligated only to recommend the provisions of the covenants to the appropriate regional authorities. The proposal would further declare that neither covenant should operate to bring within federal jurisdiction any matters which apart therefrom would fall outside it.

Few changes were made by the Human Rights Commission in 1952 in the substance of the civil and political rights to be included in the new covenant; for the most part these were transferred bodily from the earlier draft. The provisions have attracted much publicity and comment in the past few years, and are now quite generally known. Many are principles of long standing in Anglo-American law, including, among others, such rights as freedom of expression, religion and assembly; equality before the law; fair and impartial trial;[3] the right to counsel and witnesses, and to *habeas corpus* proceedings; and protection against *ex post facto* laws, against torture and inhumane punishments, and against slavery. There is, however, no guarantee against double jeopardy; and an escape clause allows a government in times of emergency to limit certain of the rights specified, notably freedom of speech and assembly. A

1. The texts of the two drafts, as they stood at the end of the 1952 session of the Commission, are printed, together with a comment by James Simsarian, in 27 *Department of State Bulletin* 20-31 (July 7, 1952).

2. *I.C.J. Reports*, 1951, 15. For an account of the general problem of reservations to multilateral treaties, as studied by the U.N. International Law Commission at its 1951 session, see this department in 37 *A.B.A.J.* 850; November, 1951.

3. The representative of the U.S.S.R. on the Commission sought unsuccessfully to have the word "impartial" omitted.

further provision bars any limitation on rights already recognized within any contracting state "on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

The Commission in accordance with a behest of the General Assembly added to both covenants an article, identical in each draft, affirming the right of "all peoples and all nations" to self-determination—*i.e.*, "the right freely to determine their political, economic, social and cultural status". The right was further declared to include "permanent sovereignty over their natural wealth and resources", and it was specified that "in no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States". The looseness of this language is obvious: for example, at what point does a group become a "people" entitled to claim self-determination? And to what extent does this lend countenance to still further fragmentation of a divided world?

Looseness of language is of special moment in the covenant on civil and political rights because of the nature of the obligations concerning them which the draft would establish. Unlike the economic and social covenant, where the undertaking by a party would be only "to take steps . . . to the maximum of its available resources, with a view to achieving progressively" the rights specified, the political covenant would impose an immediate duty on each party "to respect and to ensure to all individuals within its territory" the rights described therein; and further, to take steps to enact legislation to give effect to those rights. This represents a substantial international obligation, and in such circumstances it would seem essential that the subject matter of the obligation be sharply defined. Ambiguity or uncertainty might lead to grave embarrassments. At the same time, it may be observed that the obligations in both drafts are so phrased as to indicate that neither would be a self-executing treaty under principles of United States constitutional law.

The Commission did not have time at its 1952 session to re-examine the procedures proposed for handling complaints of violations of the covenant. These procedures, as formulated at the 1951 session, were centered on an international Human Rights Committee, to which any state party to the Covenant might submit a complaint regarding any alleged violation thereof by another state party; although ordinarily no complaint was to be submitted until after the states concerned had failed to reach a satisfactory understanding among themselves. The committee was empowered to make appropriate inquiries and to offer its good offices for reaching a solution; should none be forthcoming, it would submit for general publication a full report setting forth its conclusions on the facts and the respective contentions of the parties. The procedures proposed were designed primarily for situations involving civil and political rights; there has been as yet no agreement in the Commission on appropriate complaint machinery for inclusion in the covenant on economic and social rights.

Draft on Economic and Social Rights

The economic, social and cultural rights described in the draft covenant on that subject are in reality social objectives deemed to be desirable, rather than "rights" in any strict sense, and they are in large measure not susceptible of precise definition. Thus the right to education, the right to "the enjoyment of the highest standard of health", and the right to "take part in cultural life" undoubtedly express admirable aspirations, but it is extremely difficult to say what would constitute transgressions of these rights in individual cases. The content of such concepts must vary widely in different places at different times; they are inescapably dependent upon economic and social realities which cannot be modified by fiat overnight.

The same indefiniteness is true of other rights recognized, such as those to "just and favourable conditions of work"; to social security; to special protection for mothers and children; to "adequate food, clothing and housing" and to "an adequate standard of living". One obviously cannot speak of "enforcing" such "rights", though men and nations may well devote themselves to realizing such goals so far as circumstances permit.

Because of these basic differences between the two categories of "rights", it would seem that their assignment to two separate instruments was a wise move. As remarked above, the obligations established by the two instruments are not the same; and some concession has been made to realities in confining the duty under the economic and social covenant to one for the progressive promotion of the rights set forth. Yet even so it may be doubted whether this covenant in particular would truly advance the development it is designed to aid.

There is, of course, a great deal to be said for a reaffirmation of ideals from time to time. A covenant on economic and social rights might conceivably serve that purpose, setting forth a statement of common goals to be achieved. Yet it seems not unlikely that such an instrument, seeking to impose legal obligations on matters inevitably ill-defined, might become a focus for international recrimination rather than international cooperation. Vagueness in such an instrument would make malicious or irresponsible allegations of breach more plausible and less easy to refute; and at the same time it would make honest criticism less penetrating and effective.

The U.N.'s recent experience with germ-warfare charges is evidence of the way an international convention inspired by the highest ideals may be abused for ulterior motives. In its present form, the draft covenant on economic and social rights would seem similarly vulnerable. Should it enter into force and then be maliciously misused for propaganda purposes, the reaction against it might be a severe setback for all sincere efforts to improve economic and social conditions throughout the world.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST LAW—*"The Case Against the Federal Trade Commission"*: The Winter, 1952, issue of the *University of Chicago Law Review* (Vol. 19—No. 2; pages 297-338) contains an excellent piece of legal writing by one of the finest writers in the antitrust field, William Simon, of the Illinois Bar, who was General Counsel to the Senate Interstate and Foreign Commerce Subcommittee on Pricing in the 80th and 81st Congresses. "The purpose of this article is to prove from the record that the only tenable solution is to take antitrust jurisdiction away from the Federal Trade Commission and to give exclusive anti-trust jurisdiction to the Attorney-General." One can question Mr. Simon's proposed remedies but his attack on the Federal Trade Commission is so devastating and his material so well marshalled there seems no defense for the existence of the Commission in its present form. Every antitrust lawyer should make it his business to read Mr. Simon's brilliant piece and the Federal Trade Commission would be well advised to answer if it can. In this article there is a detailed background discussion of the position of the Commission on basing point problems and Robinson-Patman problems with analysis of the recent decisions. It is a splendid job of writing. (Address: University of Chicago Law Review, University of Chicago Press, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: $1.75.)

COMMERCE—*"A Symposium on the Proposed Uniform Commercial Code"*: The entire content of the March issue of the *Wisconsin Law Review* (Vol. 1952—No. 2; pages 193-392) is a discussion of various aspects of the new Code. Copies of the Code can be purchased from the American Law Institute, 133 South 36th Street, Philadelphia 4, Pennsylvania. The contributors to the issue are Professor Charles Bunn, of the University of Wisconsin Law School, Judge Herbert Goodrich, of the United States Court of Appeals for the Third Circuit, Professor Howard L. Hall, of the University of Wisconsin Law School, Professor Arthur E. Sutherland, formerly of Cornell Law School and now a member of the Harvard Law School faculty, Walter D. Malcolm of Messrs. Bingham, Dana and Gould, Boston, Massachusetts, Henry Harfield of Messrs. Shearman, Sterling, and Wright, New York, Professor Thomas Clifford Billig, of Catholic University Law School, John C. Pryor, of Burlington, Iowa, and Harold F. Birnbaum, of Los Angeles, California. (Address: Wisconsin Law Review, Law School, University of Wisconsin, Madison, Wis.; price for a single copy: $1.00.)

EQUITY—*"Ethics and the Statute of Frauds"*: This article by Robert S. Stevens in the Spring issue of the *Cornell Law Quarterly* (Vol. 37—No. 3; pages 355-381) is an appraisal of the present-day majority rule that the defendant in a suit for breach of an oral contract may brazenly admit that he agreed as alleged and yet defeat enforcement of the contract by pleading the statute of frauds. A survey of the history of the use of the statute reveals that this was not always so and that, in fact, for the first one hundred and thirty years after the passage of the act it was considered unconscionable for one to admit the agreement and still defend on the ground that it was not in writing. It was properly believed that, since the purpose of the statute was to protect one against fraudulent proof of an agreement which he did not make, he did not need that protection when he himself admitted the making of the agreement. The transition from this view to the present one began about 1790 and was supported upon the unsatisfactory reasoning that because an answer to a bill had to be under oath, a defendant was faced with the dilemma of honestly admitting his agreement and thus making it enforcible or of committing perjury by denying his agreement in order to defeat enforcement by pleading the statute. Therefore, to keep the defendant honest and to save him from the temptation of perjury, his "enforced" admission of the contract should be completely ignored. That the rule was once the opposite of what it is and that the modern rule is based upon specious reasoning that is contrary to the true purpose of the statute as well as the ethical principles is not generally appreciated today. However, for 100 years Iowa has had a statute which in effect codifies the early English rule and a few modern decisions indicate rebellion against a practice of distorting the purpose of the statute of frauds by permitting a defendant to claim protection from the testimony of others when such proof is rendered unnecessary by his own admission of the alleged agreement. More courts and more legislatures are urged to revert to the rule that obtained until 1790. (Address: Cornell Law Quarterly, Cornell University, Ithaca, N. Y.; price for a single copy: $1.25.)

FAIR TRADE—*"The McGuire Fair Trade Bill"*: This article by Manuel Harnik in a recent issue of the *Washington and Lee Law Review* (Vol. 9—No. 1) is a review of the new Fair Trade Bill. In view of the President's signing it into law this summer, this piece is both timely and valuable. In connection with it, the attention of the profession is called to the August 16, 1952, issue of *Business Week*, pages 41-44, and the recent Canadian study with re-

spect to Resale Price Maintenance by the Canadian Committee appointed to study their combines' legislation. That committee is composed of the following four members: J. H. MacQuarrie, W. A. MacKintosh, G. F. Curtis and Maurice Lamontagne. It has recently submitted to the Minister of Justice and Attorney General of Canada, Stuart S. Garson, P. C., Q. C., a report with respect to resale price maintenance. The report may be obtained by writing the Ministry of Justice, Ottawa, Ontario, Canada. (Address: Washington and Lee Law Review, School of Law, Washington and Lee University, Lexington, Va.)

FEDERAL PRACTICE—*"Venue and Removal Jokers in the New Judicial Code":* Arthur John Keeffe with the aid of Manley Thaler, Arthur H. Bernstein Robert O. Wright and Richard E. Gillmer in the June issue of the *Virginia Law Review* (Vol. 38—No. 5; pages 569-613) proposes a Federal Ministry of Justice. The argument is that such a body would have drafted the new judicial code more carefully. The writers contend there are "jokers" in the venue and removal provisions that demand study by the American Bar Association. President Howard L. Barkdull and Secretary Joseph D. Stecher have referred the proposals to the Standing Committee on Jurisprudence and Law Reform composed of Albert E. Jenner, Jr., Chairman, Chicago, Leonard D. Adkins, Walter P. Armstrong, Jr., Edward A. Dodd, Robert T. McCracken, Henry W. Nichols and William C. Walsh. The writers contend that under Sections 1404 (a) and 1406 (b) of Title 28, U.S. Code, the new venue provisions, it is uncertain to what actions the sections apply, how you appeal, whether you can transfer a diversity case if the law of the place to which the case is to be transferred differs and whether you can transfer to a district improper from the point of view of venue and process. The writers also contend that removal is "in a dreadful state" and action should be taken to extend defendant's time to remove, to permit him to appeal a remand order, rob him of the right to appeal his own removal and to rewrite the section with respect to removal for separable controversy so as to restore it to its former wording. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25.)

TELEVISION—*"Televising and Broadcasting Trials":* This article by Paul Y. Yesawich, Jr., in the Summer, 1952, issue of the *Cornell Law Quarterly* (Vol. 37—No. 4; pages 701-717), points out that one consequence of the use of television as an appendage of congressional investigating committees has been renewed interest in the unceasing conflict between the press and the Bar over the alleged prerogative of the press to publicize court proceedings. The press justifies the intrusion of television and broadcasting apparatus into the courtroom for the reason that since criminal trials are public proceedings, photographic portrayals are as legally permissible as verbal descriptions. On the other hand, the Bar has expressed opposition to the presence of these and similar mechanical devices which serve to convert a trial into a theatrical production lessening public respect for the judicial process and subverting the dignity of the courts. The requirement of a public trial was created not to satiate morbid public curiosity but to insure the accused against unjust condemnation. Its function is to provide an undisturbed, unemotional setting conducive to a sober investigation into the matters in issue. It is neither a means of entertainment nor of education. To require the participants in a trial to adapt themselves to mechanical devices, and specifically to have the accused submit to the unrelenting surveillance of television and thus intensify his humiliating ordeal is a serious departure from those procedures which have been fashioned by experience to insure an orderly and dispassionate quest for truth. Yet to deal with this intrusion so inimical to the integrity and independence of judicial tribunals many courts remain without either the mandate of impelling precedent or the guidance of a court rule or statute. The result is that in many instances they have reluctantly fallen prey to the fear of infringement of the press to the detriment of the presumptively innocent accused. However, it is commendable to note that a number of state legislatures and some of the courts by rule, have acted to extricate the courts from this dilemma. (Address: Cornell Law Quarterly, Cornell University, Ithaca, N. Y.; price for a single copy: $1.25.)

TELEVISION—*"The Future of Television":* Millard C. Faught in the May-June number of the *Harvard Business Review* (Vol. 30—No. 3; pages 41-49) makes a very great contribution to the legal problems facing the television business. He discusses most interestingly the problem of theater television as against home, box-office, pay-as-you-see television in a very informing article. (Address: *Harvard Business Review*, Soldiers Field, Boston 63, Mass.; price for a single copy: $1.50.)

TRIAL PRACTICE—*"A Trial Judge's Freedom and Responsibility":* This article by Judge Charles E. Wyzanski, Jr., appeared in *The Atlantic Monthly* (Vol. 190—No. 1) for July, 1952, at page 55 (price $.50) and was also printed by The Association of the Bar of the City of New York, 42 West 44th Street, New York, New York, in the June issue of *The Record* (Vol. 7—No. 6; pages 280-309), with footnotes and introduction by Judge Augustus N. Hand, of the United States Court of Appeals for the Second Circuit. It will also be separately printed in book form. Federal Judge Wyzanski gave the annual Cardozo lecture at The Association of the Bar of the City of New York. Without much doubt Judge Wyzanski is one of the most charming and interesting of the legal writers of our day. This lecture is delightful and *Atlantic Monthly* paid it a well-deserved compliment

by reprinting it. It must be almost the first time that a national magazine has reprinted a bar association lecture. As those of us who have read Wyzanski on the wisdom of the Nuremberg trials know, his outstanding characteristic is his willingness to confess error. In this lecture he does it again this way: "In 1944 a discharged OPA official brought a libel suit against the radio commentator, Fulton Lewis, Jr..... I suggested that Mr. Lewis' counsel was throwing pepper in the eyes of the jury; and at the final summation I indicated plainly that. . . . I thought Mr. Lewis had been reckless. . . . It makes no difference whether what I said was true; I should not have said it, as the reaction of the Bar and public reminded me. A political libel suit is the modern equivalent of ordeal by battle. . . . in such a contest the prudent and the second-thinking judge . . . will act merely as a referee applying the Marquis of Queensbury rules."

Why I Will Study Law

(Continued from page 836)

to the solution of these problems and enable me to live with a feeling of satisfaction.

Legal Education Is That Tool

A legal education is this tool—and in all probability, the only one which would enable me to work in those areas which my interests demand. Having scrutinized many avenues of activity and professions which might have interested me—medicine, with its opportunity for service; journalism, with its opportunity for truth and action; scientific research, with its opportunity for creative progress—I have come more and more to realize that my interests and abilities indicate that my greatest field of usefulness, to myself and my ideals, lies in the law.

It would be impossible for me to say at this time "I want to be a corporation lawyer", or "a criminal lawyer", or "a tax lawyer", or "a general country lawyer", or to name any specific field of the law in which I desire to excel. For I have had no formal training in the law. But I do know that the law is the very basis for our order of living and of our civilization and that within its framework I can find an area of activity which will provide a livelihood for myself and those dependent upon me, and will furnish me with that opportunity for service which is necessary to a feeling of worthwhileness.

Let me point out just three important areas of challenge which have greatly interested me, and in which a legal education is an obviously necessary implement.

The Midwest, in which I have lived all my life, has developed into the greatest food-producing area of the nation that exerts the democratic leadership in the world today. The development and conservation of natural resources in this area are necessary to the peace and democracy of the world. The problems of basin development, of flood control, of conservation and of irrigation present a challenge to our legal system. The conflict of federal versus local control, the problem of use and allocation of natural resources, the financing of great projects and the status of the individual, all comprise a complex question which must be worked out by my generation under our present legal and governmental framework if our nation is to continue to be the defender of democracy that it is in our world today. If I am to be fortunate enough to have a part in solving these complex questions a legal education is a necessity.

Treaty Clause Presents Another Challenge

Under our Constitution a treaty becomes the supreme law of the land. If the Covenant on Human Rights is ratified by the United States it will bring into effect the mechanism of Article VI of the Constitution which transforms every treaty into law without requiring legislative implementation. The Covenant would not have nearly the same effect in most other nations where legislative action would be required before it became law. This points up just one of the legal problems in the area of comparative and international law that must be understood to form a basis for a workable and effective world organization. But here again in the field of international and comparative law where a detailed basis for lasting world peace must be worked out, a legal education is an absolute necessity.

The structure and high character of our Government has been maintained for almost two centuries by an informed citizenry, and individual men of impeccable honesty and integrity who have shouldered the task of ridding the Government and business of fraud and graft. The demand for men of this caliber has never lessened. And it has been in this manner that men of outstanding ability have been drawn to the attention of the American public, their partners in the business of good government. A legal education is certainly a tool which is demanded of anyone in this direction of endeavor.

I have stated three portions of the legal field in which there are striking opportunities—and which also enlist my greatest interest. Internal regional and local "grass roots" government, the field of comparative and international law, and the just and honest administration of government are areas of sincere concern to me—not arbitrary choices—but challenging problems that have developed in the nature of my environment and circumstances. For it is impossible for a thinking youth of military age, thrust into the center of the trying political and international siutation of our day, to think lightly of these questions which will have so great a bearing on his future. It is natural that he should sincerely grasp for some tool with which he may make a worthwhile contribution and create a satisfying and happy life as a reward—rather than saying it is useless to try. For, to abandon the will to make better—no matter how great the effort demanded—is to deny a reason for life.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ Last year the Executive Committee of The Association of the Bar of the City of New York established The Association of the Bar Fellowship. The Fellowship is to be awarded annually to a recent graduate of an approved law school and carries with it a stipend of $4,000. During his year's tenure the holder of the fellowship will work with officers and committee chairmen of the Association on selected projects of major importance. It is believed that the holder of the fellowship will find his year profitable from the standpoint of continuing his legal education, and that he will benefit from working with leading members of the Bar on some of the practical problems of law reform and engaging in legal writing and draftsmanship under their supervision.

The Executive Committee has selected James L. Adler, Jr. as the first holder of the Fellowship. Mr. Adler graduated from the Yale Law School in 1952. He received his B.A. *magna cum laude* from Carleton College, with honors in history. He is a member of Phi Beta Kappa, and before going to Yale attended St. Andrew's University in Scotland. While at Yale he was on the Executive Board of the Student Association, was a Yale University Freshman Counselor, participated in the moot court work of the Barristers' Union, and in legal aid activities.

■ Edwin M. Otterbourg was elected President of the New York County Lawyers' Association in May. Mr. Otterbourg represents the third generation of his family who have practiced law in New York. His grandfather, Marcus Otterbourg, was a judge and served as Ambassador to Mexico; his father, Eugene, was an assistant corporation counsel in New York City. Mr. Otterbourg has been active in the American Bar Association, and is perhaps best known for the work he has done in connection with the unauthorized practice of the law. He has been Chairman of the American Bar Association's Committee on Unauthorized Practice, and

Edwin M. OTTERBOURG

has acted as counsel in a number of cases relating to unauthorized practice, the most notable being the *Bercu* case. He is presently Co-Chairman of the National Conference groups of lawyers and the American Bankers' Association, Trust Division, The National Association of Real Estate Boards, and the National Association of Life Underwriters. Mr. Otterbourg has recently published for the Survey of the Legal Profession a definitive study of the unauthorized practice of the law. Other officers elected were: Vice Presidents, Edward H. Green, Theodore Kiendl and William J. O'Shea; Secretary, Thomas Keogh and Treasurer, Ruth Lewinson.

■ As the result of a recommendation of the Special Committee To Consider the Question of Barring Communists and Other Subversive Persons from the Practice of Law, under the Chairmanship of Hall Hammond, Attorney General of the State, the Maryland State Bar Association at its annual meeting held in June unanimously resolved that the Association would provide counsel in proceedings involving persons charged with being Communistic or otherwise subversive.

According to the committee report, a fair trial might be impossible in disbarment, criminal and other proceedings brought against allegedly subversive persons as allowed by Maryland law, if the accused could not secure reputable and able counsel. The report noted that securing lawyers of this caliber in these cases is rendered difficult due to possible attempts by some defendants to use such trials for propaganda, the apparent reluctance of individual members of the Bar to act as counsel and the seeming lack of authority under existing state law for court appointment of counsel in this type of case.

Under the plan adopted, at the request of the person so charged, the Association will appoint one or more lawyers to represent him, with the appointment and the reason therefor being made public. Under the resolution, the only condition attached is that the lawyer be free to defend the case in such manner as seems proper as an officer of the court.

■ The Fourteenth Annual Meeting of the Virginia State Bar was held at the Hotel Roanoke, Roanoke, Virginia, in April, in conjunction with

B. Drummond AYRES

Chase News Photo

the Judicial Conference of Virginia. The first day of the meeting was devoted to a legal institute on "Trial Tactics", with more than 300 members of the Bar and judiciary in attendance.

Among the activities of the Association reported on at the meeting were a group accident and health insurance plan, increased interest in legal aid, a new bar bulletin, and a successful program of legal institutes.

B. Drummond Ayres, Accomac, was elected President; Langhorne Jones, Chatham, Vice President; and R. E. Booker was re-elected Secretary-Treasurer.

■ Sol Morton Isaac is the new President of the Columbus Bar Association. On taking office Mr. Isaac announced the formation of two new committees: Committee on Scope and Correlation and the Committee

Sol Morton ISAAC

George X. Volk

on Community Activities. Mr. Isaac said as to the former: "It is time to marshall the vision and ingenuity of our members, to consider the scope of our efforts and to correlate our program. Those who have been active in association work are especially qualified to block out the future, to examine our projects and policies critically. Nothing will sooner destroy the achievements which have been gained than complacency and self-satisfaction. Analysis and planning will require the best efforts of many members. They should prove to be our guarantee of future value." The Community Activities Committee was defined by Mr. Isaac, as an effort "to provide legal aid, not only to individuals but also to those organizations and civic groups and committees who are devoted to the general welfare of the community". It will "afford an opportunity for all lawyers, and especially the younger, to become indoctrinated into the activities of the community and to demonstrate to the public at large the high competencies which lawyers possess in the fields of community planning investigation, analysis and correlation". Mr. Isaac said, "All that is sought is to promote before the public the balanced temperament of the judicial and legal mind."

■ The July, 1951, issue of the AMERICAN BAR ASSOCIATION JOURNAL carried an article entitled "Placement in the Legal Profession", written by Louis A. Toepfer, Assistant Dean of Harvard Law School. This article contained several references to the work of the Lawyers Placement Bureau, a clearing house for legal positions, sponsored by The Association of the Bar of the City of New York and the New York County Lawyers Association. Since the appearance of that article, the Lawyers Placement Bureau has received numerous requests for additional information about the service that it renders. These requests, which have come from bar associations throughout the United States, express an intention to establish similar services. Hence it appears that a more detailed description of the Bureau's operation would be of interest to the readers of this JOURNAL.

During the closing years of World War II, it became increasingly apparent to the members of the legal profession in the New York metropolitan area that a serious problem of "lawyer redistribution" would result when the lawyers in service returned to civilian life. Although it was anticipated that many veterans would resume their former positions, those who had temporarily replaced them would be seeking new associations. And, under government aid-to-education programs, literally thousands of new lawyers would be entering practice each year.

The only placement facilities existing in the late 1940's were those of a few law schools whose efforts were, quite properly, directed entirely toward their own graduates. Because the impending placement problem would affect many lawyers to whom no aid was available, the local bar associations joined together to sponsor a "War Committee of the Bar", one of the primary functions of which was to find available positions, and refer the veterans to them. The Committee fulfilled its immediate obligation, while at the same time performing an equally valuable service in demonstrating the desirability —indeed, the necessity—of having some form of organized placement aid available on a permanent basis to all members of the legal profession. Hence, in May of 1947, The Association of the Bar of the City of New York and the New York County Lawyers Association took over the placement work of the War Committee, and launched the Lawyers Placement Bureau.

At the outset, the Bureau's task was largely one of acquainting potential employers and employees with the services it had available. The initial move in this direction was the mailing of a letter to the 11,000 members of the associations sponsoring the Bureau describing the procedures to be followed by those desiring to use its facilities.

The first positions listed were those of minor importance to the firms (if not to the applicants). However, although the Bureau has been in operation only five years, it has already acquired the confidence of employers and employees to such an extent that its registrants are often placed as house counsel with some of the largest corporations in the country, or as senior attorneys in sizable law firms. And the Bureau has even been called upon to assist in creating new firms by referring attorneys of partnership caliber.

The surprising growth of the Bureau would not have been achieved unless two cardinal rules were meticulously observed in the referral of applicants: (1) *never* refer a registrant unless he has the precise qualifications for the position, and (2) *always* submit the qualifications of the registrants in written form for the employer's initial consideration.

In order to refer only those registrants whose qualifications match the job requirements, it is necessary to maintain fairly comprehensive amounts of data, in a simplified filing system. By the use of varied colored flags, denoting legal specialties, at the top of the 5″ by 8″ data card for

each applicant, the Director is able to screen several hundred cards in a relatively short time. It might be added parenthetically that the files of this Bureau are perhaps more voluminous than those would be in any other area, since there are always between 800 and 1200 admitted lawyers, recent law school graduates or students seeking placement through this service. In spite of this, however, a staff of only two full-time employees and one part-time employee is needed to handle this volume of work.

To meet staff salaries, and to cover publicity costs, each Association contributes $4,000 yearly to the Bureau. Additional income is derived from a $5.00 fee assessed each registrant at the time his name is placed in the active file. There is no fee upon placement, nor is any charge made to an employer.

The success of the service which the two bar associations are rendering to the organized Bar, and to the community generally, can be measured by the number of people who have turned to it for assistance: well over 12,000 people have visited the Bureau to register or to seek job information; approximately 1,500 positions have been serviced; the Bureau has secured a position for one in about every five people who registered. This service will continue to grow because employment is a continuing problem, and because growth is built upon success.

■ **The Iowa State Bar Association has made available to its members protection liability insurance at a reduced rate, with a $500 or $1,000 deductible clause. The policy will be written by a leading insurance company.**

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Disagrees with Mr. Cullinan

■ I suppose the JOURNAL still welcomes short comments on controversial articles. Eustace Cullinan, Sr., accuses everyone of "judicial exegesis" who is opposed to sending an American ambassador to the Vatican. The "scholiastic" opponents supposedly do not stick sufficiently to the text, *i.e.*, the United States Constitution. But Mr. Cullinan himself does not stick sufficiently to the facts. Ambassadors to the Holy See are accredited not to the head of the diminutive church "state", but to the head of the Catholic religion. According to the press, the Pope insists on this custom. This is clearly aid, preference to and recognition of religion or church which Americans exchange for overemphasized clerical intelligence. Actually, it is, of course, the Catholic Church which stands to gain from our present policy of recreating the Holy Roman Empire of Charlemagne and close diplomatic relations. It is not true that we already "send ambassadors to various heads of religions". They were accredited to the sovereigns of certain states who happen to have also some clerical functions which do not appear in the state papers accrediting our ambassadors. These minor functions do not make these states authoritarian clerical church states like the Vatican.

Mr. Cullinan's article only once more shows that there is a concerted effort to destroy drop by drop the wall separating church and state, whether it is there by "exegesis" or not, and to make religion the conscience of the state. In view of these long-range efforts, it appears high time that lawyers and political parties immediately after the election band together proposing a new amendment to the Constitution affirming that the wall is what Jefferson in 1802 and Mr. Justice Rutledge in *Everson* v. *Board of Education*, 330 U. S. 1, have stated it to be. I for one am tired seeing Messrs. Jefferson and Rutledge being used as whipping boys by a minority which apparently does not dare to attack the majority of the American people for their convictions.

FREDERICK WALLACH
New York, New York

Call Vatican Ambassador "Unnecessary Appointment"

■ Re: "The White House and The Vatican: The Legal Aspects" which appeared on page 471 of the June, 1952, JOURNAL.

Although you commented that the above article purportedly discussed only the constitutional and legal aspects of the "Ambassador to the Vatican" issue, I'm sure that no one who read the article could escape the atmosphere of pro-Vaticanism which surrounded it.

Let us have the equally worthy and more logical reasons against such an unnecessary appointment discussed in an early issue of the JOURNAL.

D. KENDALL COOPER
Cincinnati, Ohio

The Problem of Legal Research

■ Mr. Sidney Teiser's excellent and forward-looking article in the May, 1952, issue of the JOURNAL ("Law Books of Tomorrow", page 378, *et seq.*) points the way out of the morass of accumulated difficulties standing in the way of gathering, maintaining and using various legal materials.

Microfilm, once the prejudice is overcome of using it by persons who like the "feel" of books is the answer to severe space limitations in the face of the constantly increasing flow of decisions, legislative materials and other relevant documents to the legal process.

But there remains another facet of this problem of legal research which is not yet fully answered. Mr. Teiser touched on it in describing how a reference is located in a microfilmed book:

"Since in law research it is necessary to locate easily the particular page of a book where the case in point appears, a microviewer has been developed with a surprisingly simple page-finding device. Any page of a book or report may be readily and quickly located by a movement of the arm or turn of the wrist."

This is, of course, the procedure after the DESIRED reference is established. It seems to me that we have not found the answer to determining—in legal research—in a quick, easy and exhaustive manner what the references are. And here is where so much time and effort are consumed.

First, for example, after a trip through a word-phrase index and then through a digest (or, for the sake of completeness, a series of digests) after a key reference is found, there are then the decisions (if this is what we are investigating at the time) themselves to go through. Every lawyer knows what a laborious procedure this can be.

In the *Chicago Daily Law Bulletin* several years ago (November 24, 1947, page 1, "A Method of Legal Research for Atomic Age") I suggested the possibility of indexing legal material on punched cards. Then, by the use of electric or electronic sorters and alphabetic tabulating or printing machines, a whole bibliography could be quickly spread out before the researcher.

Of course, the amount of information which can be included in the standard punched card is limited by the physical structure of the card, although one has been developed with a microfilm strip in its body. The card, then, can itself be viewed in a suitable viewer.

I have seen such film strips inserted in both I.B.M. and McBee Keysort cards. On an I.B.M. card, because of the mechanics of the system, the size of the film strip is smaller than the insert in a McBee card. But, on the other hand, the McBee card is limited in its sorting possibilities and information in the card cannot be printed automatically as the card passes through a tabulating machine.

Yet, even these limitations seem to have been overcome by a system worked out by Dr. Vannevar Bush and the United States Department of Agriculture, and by one worked out by Dr. Morris Asimow, then Professor of Engineering at the University of California at Los Angeles. I believe, and I am writing from a somewhat hazy recollection of these matters, that *all* materials being kept are placed on microfilm made up into reels. By indicating the materials desired to be viewed by inserting the preselected code into an electronic selector the reels can be revolved automatically to the desired frame and projected through a viewer or on a screen to be read or photographed.

I have passed these observations on merely to carry Mr. Teiser's suggestions to their logical conclusions. This letter leaves unanswered the problems of appropriate coding and indexing, financing and so on. However, solutions will be found for them, if the ideas mentioned here are practicable.

Lawyers of the future will have to be mechanically inclined, apparently, to succeed in the practice. But science will simplify some of their work. True, it may take a little while to get the machines to distinguish and argue the cases, yet the new science of "Cybernetics" may steer us to that!

EDWARD S. FELDMAN
Los Angeles, California

Mr. Hanna on Mr. Canham on Mr. Hanna

■ The letter from Mr. Canham, editor of the *Christian Science Monitor,* in your issue for June, answering my letter in your March issue, deserves an explanation from me.

The statement attributed to Mr. Canham (which I criticized because I apparently misquoted it) was to the effect that objective reporting is basically wrong. My source was Winchell's column for June 5, 1951, and if any apology is necessary, it is for having relied on that source. If Winchell misquoted Mr. Canham, then it was Winchell alone that I was criticizing together with the point that the latter gentleman was trying to prove.

The gist of Mr. Canham's actual remarks, as he gives them to you, is that a "bare news event can be so misleading as to be false" unless accompanied by a "balancing fact" that will round out the picture and prevent a false impression being left with the reader. This, as Mr. Canham rightly adds, requires "integrity and knowledge and understanding and balance and detachment". Properly carried out, the result is really objectivity, as it should be, and not subjectivity at all. The question bears a certain analogy to the long-standing controversy between the advocates of the literary approach and those who favor the scientific approach to history. Probably the ideal answer is an intelligent balance between the two.

What Mr. Canham apparently actually said is a different proposition from the misquotation upon which I innocently relied. It would seem that he and I are in complete agreement after all.

I like your editorial comment: "Perhaps the misquotation is an example of one of the hazards of news interpretation to which Mr. Canham refers."

W. CLARK HANNA
Philadelphia, Pennsylvania

Tax Law and Accountants

■ Reference is made to the article by George R. Sherriff, entitled "The Law and Taxation", in the July issue of the AMERICAN BAR ASSOCIATION

JOURNAL, and, while I am wholeheartedly in agreement with the writer's general premise that the field of taxation is an integral part of an attorney's general practice, I do take issue with the author in regard to certain statements that he has made in regard to the roles of the lawyer and accountant in the field of federal taxation.

The statement is made that some tax problems are only accounting problems. I am definitely of the opinion that there is no tax problem which is only an accounting problem. If it *is* a tax problem, it is a legal problem. The practice of taxation is the interpretation of statutory law of the highest complexity and all of its problems, whether reduced to dollars and cents terminology or legal verbiage, are matters of statutory construction. We doubt seriously that the average accountant is qualified to prepare proof necessary to support statutory construction under the legal rules of evidence; therefore, we disagree that the accountant is primarily fitted to prepare what we consider evidence and what might later become the basis of tax court or appellate court litigation. A survey of the tax cases based upon the reported B.T.A. and Tax Court cases shows that the taxpayer loses most often on failure to substantiate his case; that is, to prepare his evidence and submit it properly. It may be that in these cases too much reliance was placed on the accountants in this respect.

In the matter of evidence, we doubt that an accountant is qualified to prepare the evidence to support figures in a negligence case, if an attorney cares to submit a breakdown of his figures. We think the same is true of tax matters. Mr. Sherriff, having been closely associated with the Bureau, has dealt, we venture to say, more with accountants than he has with lawyers. It has been our experience that until the Tax Court is reached, the Bureau would rather deal with an accountant than a lawyer, because the accountant, through astute study of the problem and the Bureau, talks its language. Lawyers as a whole have neglected to do this.

Mr. Sherriff makes the statement that lawyers are not usually qualified to handle accounting problems and should not attempt to resolve them. He could have made the statement in regard to taxation. Most attorneys with whom I have come in contact, in my limited field, are woefully lacking in the basic principles underlying the law of taxation. Since accounting is practically the basis of modern business, any lawyer who expects to represent businessmen and business problems should learn to talk the language of the accountant. In many respects, I believe that a lawyer's education is deficient in that it does not supply a background of accounting and business practice as a prerequisite to its study. Every lawyer should study auditing (which is merely proving the correctness of prepared accounting figures) as an adjunct to his course in evidence. This would familiarize him with an examination of the recorded business facts and documents upon which this recording is based. In short, it would teach him how to find the facts to present tax evidence.

The practice of taxation is truly a dual field for the lawyers and accountants, but in my opinion, it is *primarily a legal field*, wherein the accountant has been an opportunist and filled in to supply the public with a service that the average lawyer, for reasons best known to himself, would not supply.

RICHARD G. DARROW

Tucson, Arizona

The Electoral College and the Congress

■ The masterly presentation of the case by Kirby W. Patterson, in the July issue of the JOURNAL has me thoroughly convinced of the need for the merging of responsibility for the executive and legislative branches of the Federal Government, but inspires speculation as to the merits of the remedy.

Our experience seems to have been that our chances of getting a highly qualified man for the Presidency are much better than our chances of electing similarly well-qualified men to the Senate and House of Representatives. Most people will probably shudder at the thought of having our President elected by the majority vote of any recent Congress.

What would Mr. Patterson and others think of the alternative, that a vote for a President should simultaneously be counted as a vote for each Senator and Representative to be elected in each district? The Senators and Representatives of each party would thus constitute a complete national ticket, very much as do the members of the Electoral College under present procedure.

Each electoral district would then elect members of Congress in harmony with the candidate for the Presidency who is preferred in that district. It should follow, although interesting mathematical research might disclose possibilities for variance, that in each Congress the President would be supported by a majority roughly proportionate to his majority of the total popular vote.

ARNOLD R. BAAR

Chicago, Illinois

Dissents from Patterson Article

■ I have just read "A Responsible Presidency: Suggestions for a New Method of Selection" by Kirby W. Patterson in the July issue of the AMERICAN BAR ASSOCIATION JOURNAL.

I think Mr. Patterson would do well to read the essay on the "Liberty of Thought" in Charles Morgan's *Liberties of the Mind* (Macmillan, 1951). There Mr. Patterson will find that Montesquieu was right and that he, Mr. Patterson, is wrong about the separation of powers.

The principle of the separation of powers, has as its base the underlying principle of balance which cannot be successfully attacked. The executive and legislative departments should never be combined.

Mr. Patterson should remember too, that the "efficiency" to which he refers is not the aim of our Constitution, which seeks to preserve the Re-

public and with it the precious right of liberty. How could anyone today forget Lord Acton's warning about the danger of power and especially of concentrated power?

It is this current drift towards a totalitarian form of government which should make us honor the deep thought of Montesquieu and not follow the carping criticism of him by Trevelyan, who did not understand the principle of balance. On this subject of power too, has Mr. Patterson forgotten the recent seizure of the steel plants by President Truman? I recommend that he read the opinion of the Supreme Court of the United States in *Youngstown Sheet & Tool Company* v. *Sawyer*.

WALTER H. BUCK

Baltimore, Maryland

The Problems of the Lawyer

■ Mr. Cantrall's article "Lawyers Can Take Lessons from Doctors" appearing in the March JOURNAL should be read at least twice by members of the Association. Although I do not agree with him in all particulars, he will cause you to think about the problems of the legal profession. All of us want an answer—a reason why—a way that will increase our income, and pay us for investment of the costs of our education and the annual costs of keeping an office which will receive the respect of the other members of our fraternity; but will also allow us to spend 25 per cent of our time in the work of our civic clubs, or churches, the Boy Scouts, Red Cross and Community Funds.

I disagree with the writer when he says that we have less instruction than the doctors, as it appears to me that we should take into consideration two or three years of apprenticeship prior to the time we can call ourselves full-fledged lawyers. The young lawyer who does not have the opportunity of apprenticeship with a firm will have to take longer, as he (like the young doctor) needs the internship, working under the supervision of the older practitioner. Personally, I believe that we should not grant a license to practice law until an applicant has been at least three years in the practice, working with a temporary permit, thus eliminating the men who are in real estate business, etc., who have never been in the actual practice. I do not recommend that the legal profession should do as the medical profession, restrict the number of young men entering into the profession; it may be true that there are too many lawyers graduating from law school; but this is better than having so few doctors graduating from medical school that they are not replacing the men who are retiring by reason of ill health, old age and death.

In Oklahoma City, we have from six to eight meetings each month where a paper is given on real estate, probate, mineral, estate planning, etc., by the top men of our association, and men outside of the association who are specialists in their field. The state bar association puts on a monthly program in various parts of the state and at our annual meeting, we cover the entire field by bringing in the top men of the country.

It appears to me that it takes much more time to handle legal problems than it does medical problems. The same kinds of pills will cure chills and fever in South Texas as may be used in Maine, and there are very few diseases which the ordinary doctor is unable to handle at this time. The few that they admit not having prepared prescriptions for, are being worked out by the scientist as well as the medical profession. A doctor can see ten or fifteen patients each day, while a lawyer will do well to handle the business of two or three clients. It is true that each person has to be treated differently for the same disease, but the doctor does not have to consult a library of several thousand books in order to determine the difference. A young lawyer is compelled to have a larger library than the best doctor of your city.

A few years ago one of the leading lawyers of this city said that he was accepting an appointment to the trial bench, as he felt that his practice had been such that he could answer most of the questions presented without too much time or worry. After four or five years on the bench, he stated that he had not had presented to him a question which he had covered in his personal experience. That each case presented a different question and that he was kept busy trying to decide the questions which were being presented to him by able members of the association.

A doctor knows that in most instances his patient will get well by the little assistance that he can give, that nature resists most illness. The doctor also does not have another doctor on the other side of the operating table stating that you should do it this way or that way. His patient, being under anesthetic, also does not interfere. A lawyer is compelled to put in more time, as he knows that his client will not only be critical of any work that is not done as the client thinks it should be done, but he will have a lawyer representing or covering the other side, or who at sometime will check his work and often will disagree with him. In most instances, the judge will have the final say after he has heard the matter presented by both sides.

I have met a few lawyers who thought they were so well versed in the law and so important that the trial court would take their word, but find that some hard-working young lawyer will be able to bring into court enough decisions by the court to show that this important member is important only in his own mind. A man will pay more to save his health than to save his business. He thinks he is entitled to win the cases that you won for him, and not entitled to lose the cases that you lost for him.

Take two cases in the office of the average lawyer. A man and his wife entered into a separation agreement in Illinois prior to a Nevada divorce decree. The trial court in the decree stated that the agreement was approved and adopted, but did re-

quire its terms to be set out in the decree. The husband moved to Oklahoma and became a successful businessman and the wife was compelled to sue him for support, so we have among other questions:

1. Was the agreement merged in the decree?

2. May the Nevada court merge it therein with a *nunc pro tunc* order without notice?

3. Does the Nevada court have authority to change or modify such decree after a few months or a few years with or without notice?

4. What credit must the Oklahoma courts give a Nevada *nunc pro tunc* order?

5. Does the full faith and credit clause of the Constitution affect such orders or decrees?

After months of research the lawyer will present in his brief cases from Oklahoma, Nevada and the Supreme Court of the United States. Cases found in 50 Fed. to 105 F. 2d from Delaware, Utah, Illinois, Washington, Ohio, Kansas, California, Montana, New Hampshire and North Carolina. The night before you are to present the oral argument, your doctor friend drops by for a game of bridge. He states that he must go home early as he has a very difficult operation to perform in the morning and he would like to spend a few minutes in checking some technique, that he will have to be at the hospital at 7:30 to operate at 8:00, that he has some appointments at 9:00.

This average lawyer has another case in his office, in which he is on the defending side of businessmen, whom he has represented for several years on retainer fee. This case involves the livestock commissionman who is financing a cattle trader at so much per cow. The trader turns over checks payable to himself to the commissionman's bookkeeper who credits the trader's account, indorses the trader's name on the checks, and instead of depositing them to the commissionman's account, deposits the checks to the bookkeeper's personal account in a downtown bank, or cashes them at some other bank or loses them in gambling games. You represent the maker, the maker's bank, and the downtown cashing bank. Among other questions, we have:

1. The authority of the bookkeeper to indorse the trader's name on the checks.

2. Who is the rightful owner of these checks, the real party in interest?

3. Can an action be maintained against the maker, the payee bank, the maker's bank, or who can be made party defendant?

This time the lawyer decides to keep a record of his time, he puts the junior member of the firm in the law library searching out, not only the questions that come to the mind of the senior member, but any that may come to the mind of the junior member, while he is making this research. When you check back over your time record you find that your time will justify a fee that would be considered unreasonable by either of these clients. They will look over the separate trial briefs that you have prepared and see that you have put in a lot of time in finding decisions from Washington, Georgia, Colorado, Wisconsin, Kansas and other states in addition to your own Supreme Court, and that you have again assembled a drawer of legal files and briefs. But your clients have never felt that they were liable and will, of course, not understand any necessity for your putting in so much time on such matter. They feel that as they were not liable, you should have gone out to the courthouse and told the judge this. So that you wind up, instead of receiving from $10.00 to $20.00 per hour for the work involved, by sending a fee bill of less than a dollar per hour.

My only solution is that we eliminate all opponents, and that we have as clients only those who are not smart enough to know that our statements as to his rights should not be questioned by anyone, and that the legislators in the different states pass acts repealing and revoking all prior laws and decisions, so that we will only have to refer to the acts of the last legislatures, which can be printed in one volume that may be carried in our pockets, thus eliminating the burdensome job of carrying files and briefs to the courthouse. If this is impossible, we must continue to put in long hours for the glory of our profession and our fellow man.

TOM W. GARRETT

Oklahoma City, Oklahoma

Books for Lawyers

(Continued from page 843)

ing a promise which the work fulfils. It is in fact a source book, and it has characteristics which we commonly associate with well-written textbooks. For that reason, I have no hesitancy in recommending it to practitioners, as well as to the students for whose needs it was evidently primarily prepared. The opinions, about one hundred, which, scattered throughout, are given in full, do not occupy a disproportionate part of the 1029 pages. The number of additional cases cited or quoted from cannot be readily determined, since not all of them are referred to in the table of cases, but the number is large. A detailed table of contents is supplemented by an index.

WALTER L. NOSSAMAN
Los Angeles, California

CONGRESS, ITS CONTEMPORARY ROLE. *By Ernest S. Griffith. New York: New York University Press. 1951. $3.50. Pages 193.*

In a time when it has become almost fashionable to malign Congress and to picture its members as buffoons of the Senator Claghorn variety, there is something pleasantly reassuring to encounter such language as "no one can be intimately related to Congress for long without a genuine appreciation of the role played by a desire to promote and safeguard the general welfare as expressed in its organization and procedure". These are the words of Dr. Ernest S. Griffith in his latest book, *Congress, Its Contemporary Role.*

Such an observation becomes even more comforting when its author is one whose training and position eminently equip him to make an accurate and objective evaluation of our national legislature. Dr. Griffith attended universities in the United States and in England and thus gained familiarity with the constitutional systems of both countries. He has served on the faculties of numerous great American institutions of learning, among them Harvard and Princeton, and has been chairman of the Research Committee of the American Political Science Association. Since 1940, Dr. Griffith has acted as director of the Legislative Reference Service of the Library of Congress from which vantage point he could easily observe the evidence upon which to predicate an encouraging evaluation such as that quoted above.

Dr. Griffith's most recent work, however, is by no means merely a eulogy to the American Congress. Indeed, the author is quick to indict weakness where he finds it. Rather this volume is intended to bridge the gulf between the popular picture of our national legislature and its reality, to analyze Congress under the Constitution, in relation to other governmental departments, and to evaluate its ability to respond to a changing age. More specifically Dr. Griffith announces at the outset that his basic inquiry will be to discover the changing constitutional position of Congress as brought about by the "informal constitution" which grows from usage and custom. The author firmly believes that the most far-reaching constitutional changes which involve Congress occur because of usage rather than by formal amendment or judicial decision, and he supports his thesis in a convincing manner.

As one reads this volume he is impressed from the opening words ". . . The Congress of the United States is the world's best hope of representative government" to the final paragraph, by the positive and optimistic style of presentation. Congress is pictured as facing the major enemy of world communism and the fundamental dangers of self-centered special interests and an overbalancing bureaucracy. Yet these menacing factors are not viewed with what has become an almost typical air of resigned futility, but rather as giving our national legislative body an increased opportunity, and with it, a more important place in the constitutional framework.

Another quickly discernible technique which permeates this book is the dynamic and realistic approach used throughout. Dr. Griffith is interested in Congress as it *is*, not as it has been so often presented in textbooks, with traditional statements as to its size, its qualification for membership and its constitutionally enumerated powers. For example Dr. Griffith analyzes in considerable detail the constant struggle for position between the executive and legislative branches and he evaluates with refreshing candor the weapons upon which each protagonist must rely. Then too, he allows himself a chapter each in which to discuss the following vital and timely subjects as they are related to Congress: International Policy, Appropriations, Pressure Groups, Economic Planning, Political Parties and Public Education. Any reader who has become impatient with "textbook approach" to Congress will find himself particularly attracted to two unique chapters. The first deals with "The Congressional Response to the Technical Age" and traces the adjustment which our legislative body has made to the changing times under which it has been required to function; the other deals with "Congress in a Crisis" and traces, with historical examples, the ability of that institution to adjust to the crises which seem to be plaguing our republic with an increasing frequency.

From the foregoing it might appear that Griffith prefers to deal with general rather than detailed matters that face our national legislature. Such is not the case. In his chapter on "Internal Organization of Congress" the author sets forth thirteen specific criteria which should characterize good organization and procedure, and then comments upon how the national legislature satisfies these standards. Then too, in a final chapter he summarizes the development of his thesis point by point and includes a statement which emphasizes the growing importance of Congress. "Now that the Supreme Court has accepted nationalism, the task of safeguarding our federal system has fallen into the lap of Congress. An inherent localism in its viewpoint makes it possible for it to do much in

preserving state and local vitality and autonomy and in attending to local interests."

As has been said, *Congress, Its Contemporary Role* is not a textbook. Although it should have great appeal to the student of politics, it will be equally welcomed by the inquiring citizen who believes that knowledge is the first principle of good government. Lawyers will feel on familiar ground as they read this volume since the author has used many well-known constitutional law cases to illustrate his argument. On the other hand, the reader is never left with the feeling that the book was designed solely for the technical consumption of the legal counselor or the political science professor. With the role of Congress constantly expanding and with 1952 a year for congressional elections, any reader will find in this volume a timely and worthwhile excursion.

LOYD WRIGHT
Los Angeles, California

MONEY IN THE LAW, NATIONAL AND INTERNATIONAL. *By Arthur Nussbaum. Brooklyn: The Foundation Press, Inc. 1950. $8.00. Pages vii, 618.*

This is Professor Nussbaum's second work on the same subject. His earlier and considerably less complete *Money in the Law* appeared in 1939, and was reviewed in 7 *University of Chicago Law Review* 195 (1940).

As he says, the main renovation in his present volume consists in the increased emphasis on the international ramifications of the subject. This is most apparent in the third chapter of Book Two, dealing with "International Antagonism—International Cooperation" and discussing such subjects as "Exchange Control"; "Warfare and Military Occupation" and the "International Monetary Fund".

The book is not one which the average practicing lawyer would keep at his elbow for constant use in daily work. However precarious its present situation may be, our domestic money is still so stable, and the rules for handling it are generally so well known, that most of the internal problems with which Professor Nussbaum deals do not often face us. Similarly, only a small percentage of the Bar have affairs involving foreign currency and exchange.

However, for those who enjoy departures from their beaten paths, the book offers a broad field for philosophical browsing. As the Professor correctly says: "There is hardly a theme in legal and economic science which attracts the searching mind as does the subject of money." Moreover, he has touched upon all its more fascinating phases in his treatment of "The Concept of Money", "Legal Tender", "The Monetary System", and "The Notion of World Money", to name but a few.

The writer has not attempted to popularize his subject, but has kept on the level of higher criticism. Consequently, to follow him with ease the reader must be fairly well grounded in the lore of economists and must be reasonably familiar with the statutes and decisions cited. However, this fact does not detract from the book's interest. The abundant footnotes give ample leads to necessary source material.

In these days when fiscal fancywork is a favorite pastime throughout the world, a book such as *Money in the Law* is well worth the reading. In it are discussed the various governmental moves in the game, the counterdevices employed by the affected citizenry for self-protection, and the attitudes of the judiciary toward both. To quote the barkers at the ball parks, you cannot follow the play without a scorecard.

ROBERT B. ELY III
Philadelphia, Pennsylvania

There are numbers of kind-hearted, well-meaning, learned and able men among the Bureaucrats, but if you want to discuss the affairs of the world with them, you must do it in a language which it is impossible for the man in the street to understand. These excellent servants of the State are cramped in their endeavours towards right action by the traditions of their mystery. A priest will preach to you in Latin, a doctor will write his prescriptions in Latin, and a lawyer will quote his maxims in Latin, and a Civil Servant will write you his decrees in English degraded with Latin. In this way they "moomble so yo' canna 'ear what they say"; and it is to be feared that some of them hug their tradition of mumbling, because it hides the painful secret that in truth and in fact they have "nowt much to talk about."

—Parry, *My Own Way*, page 264

1952 Ross Prize Essay

(Continued from page 824)

the views expressed in these opinions that a flip of a coin would be almost as reliable as the opinions in affording a foundation for a prediction as to how this schism might coalesce in deciding a subsequent case.

Disagreement Among Judges May Block the Result Majority Favor

Moreover, judges may become so preoccupied in expounding their tenuous refinements of reasoning that they lose sight of the primary problem in the case before them. In *Northwest Airlines v. State of Minnesota*,[32] the state had levied a personal property tax upon the full value of all airplanes owned by a company domiciled in the state, even though most of the airplanes were constantly flying in and out of other states in interstate commerce. The validity of the tax was in issue. If it be conceded that somewhere, to some taxing authority or authorities, the company should pay a personal property tax upon not more, and not less, than the full value of its airplanes, the basic problem in the case was to determine what jurisdiction or jurisdictions could tax the airplanes to the extent of their full value. Three members of the Court united in the prevailing opinion and held that Minnesota could tax the full value of the airplanes because the company was domiciled there. However, under this opinion, other states in which the company operated could also tax the airplanes upon a proportional part of their value. Hence, under the opinion of the Court, multiple taxes could be imposed, and such taxes could be based upon more than the full value of the airplanes. Justice Black concurred upon the ground that taxation by Minnesota of the full value had not been forbidden by Congress. Justice Jackson concurred upon the ground that Minnesota was the "home port" of the airplanes. However, he expressed the view that Minnesota's right to tax should be exclusive, with the result that multiple taxation would be prevented. Four Justices dissented and said that the tax upon full value should be apportioned among the states in which the company operated, so that the company would not be required to pay more than a tax based upon the full value of the airplanes.

Thus, under the opinion of the Court, Minnesota could base its tax upon full value, and any number of states could impose additional taxes based upon fractional values. This result was reached despite the fact that a majority of the Court, to-wit, Justice Jackson and the dissenters, had made clear their belief that nothing more than a tax based upon full value should be permitted. By disagreeing over methods, these five Justices prevented the attainment of a common goal. Neither equity nor predictability is furthered when a result is so sacrificed to a method.

One may well doubt if differing interpretations of precedent give rise to the multitude of opinions in such a case. Precedents often are ambiguous, but they are seldom so ambiguous as to afford a basis for four interpretations. More probable is the conclusion that some such opinions arise from a blithe disregard of the doctrine of *stare decisis*. It is here that one arrives at the crux of this entire matter.

If a concurring or dissenting opinion is not written with full respect for the doctrine of *stare decisis*, it serves neither to improve our jurisprudence nor to afford a reliable basis for prediction. It is one thing to respect the doctrine of *stare decisis*, but, from time to time in a dissenting or concurring opinion, to argue that a particular precedent is wrong or outmoded and should be overruled. It is quite a different thing to indulge in an iconoclastic endeavor to upset all that has gone before by making concurring and dissenting opinions mere vehicles for the conveyance of pet ideologies. The certainty afforded by a strict adherence to precedent should at times give way to an evolution of legal principles required by changed conditions and concepts. However, evolution rather than revolution should be the rule. If the decisions of a court are consistently accompanied by concurring or dissenting opinions which represent attempts to substitute the impulses of the present for the wisdom of the past, the law suffers, and the only possible prediction is one of chaos.

There are those who charge that some of our appellate courts have already reached this chaotic condition. The facts sometimes do not permit a denial of this charge. However, where such a charge is justified, the remedy does not lie in the suppression of concurring and dissenting opinions.[33] Rather, this condition must be cured by inducing or compelling the courts to return to the doctrine of *stare decisis*, to the end that the concurring and dissenting opinions which inevitably will be written will perform the many beneficial functions for which they are so well fitted.

32. 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 283 (1944).

33. In 1845, Pennsylvania enacted a statute forbidding the publication of dissenting opinions. The statute appears to have died from desuetude. See 71 *Pa. L. Rev.* 205 (1923).

The President's Annual Address

(Continued from page 829)

proving the administration of justice, campaigning for judges with proper qualifications and bringing about an appointive uncoerced judiciary, pushing the battle against unauthorized practice and urging the individual lawyer to educate himself to do a better job than the unauthorized practitioner, making the facilities for Legal Aid and Lawyer Referral Service available for all, by the development of administrative procedure, encouraging a nonpartisan expression on public issues, emphasizing good citizenship, supporting community enterprises, combatting the commercialization of the profession and the tendency to make it a business,—these are examples of methods for improving the attitude of the public toward the lawyer and his profession.

A joint responsibility is involved, on the part of the Bar and the press, sharing as partners the obligation to promote the interests of good government and high standards of citizenship. The lawyer is always on the side of freedom of the press, and the newspapers give evidence of being heart and soul with the Bar in this entire program. The legal profession asks no freedom from criticism at the hands of the press, but rather invites it as a means of guarding against mistaken policies. The ultimate objectives of press and Bar are identical, and the partnership is, as it should be, a lasting one.

(d) Individual Rights and National Security

At the Mid-Year Meeting of the Board of Governors six months ago the following resolution was adopted, creating a new Committee on a highly important subject:

> BE IT RESOLVED, That the Board of Governors of the American Bar Association expresses cognizance of the special responsibility which devolves upon the legal profession when the paramount demands of our national security come into conflict with the exercise of the rights of the individual citizen, which are the cornerstone of our form of government.
>
> The Board of Governors therefore recommends to the House of Delegates that a special committee of the Association be created to be known as "The Special Committee on Individual Rights as Affected by National Security". The committee shall make such recommendations to the Association, and with the approval of the House of Delegates or Board of Governors shall take such action, as may be deemed appropriate to bring about the best possible balance between the demands of national security and the exercise of the freedom of the individual citizen.

This Committee, under the chairmanship of Whitney North Seymour, of New York, will be making its report to the Board of Governors during the course of the present week. The importance of its investigations is emphasized by things that have happened within these past six months. During the course of the events connected with the recent steel strike the Government attempted to prevail upon the Supreme Court to recognize a right vaguely called the doctrine of inherent powers, never previously asserted, let alone granted, but claimed to have accrued to the office of President from the customs and claims of preceding administrations. In connection with the work of our own Committee on Individual Rights it is interesting to observe that Mr. Justice Jackson in his concurring opinion in the steel case used the following language:

> The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.

In a footnote Mr. Justice Jackson makes the following comment:

> We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be *under* the law—which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the law.' "

The Association

At the beginning of this year, a few people who probably know me better than I know myself said very frankly, "Howard, the most important task for you to perform this year is the development of the organization of the American Bar Association, to keep it abreast of the increased scope of activities". This I have tried to do, and it no doubt accounts for the fact that the present report deals primarily with the subject of organization. It is perhaps the reason, also, for the incoming President's appointing me Chairman of the Organization Subcommittee of the Board of Governors for next year.

I wish to pay deep tribute at this time to Mrs. Olive G. Ricker, Executive Secretary of the Association for the past twenty-eight years, who retires from her official duties at the adjournment of the final session of the Assembly on Friday of the present week. She has been invaluable in her help to me as President of the Association, without cessation, from the time of making Committee appointments during the summer of 1951, right down to the present moment in carrying through the arrangements for this 75th Annual Meeting. To every other President during this entire period, the services of Mrs. Ricker have been of equal help, characterized by untiring devotion to the best interests of the organization. During these years

there has been an increase from a membership of 22,000 to the present roster of 47,500. I am safe in saying that no one in the United States today is personally acquainted with so many American lawyers as is Olive Ricker, and no one is so well loved by all of us.

The future responsibility for the Headquarters Office will be that of Edward B. Love, our Director of Activities, who now has the benefit of a year and a half of service in that capacity and has already displayed his executive and administrative ability. On his shoulders will fall the further development of the Headquarters Office, especially the departmentalization called for by the growth of the Association and the multiplication of its activities. One of the necessary steps will be the relief of the President from a considerable amount of the correspondence he is now called upon to carry, conserving his time and attention for more important questions of policy and the making of major declarations of such policy. Another development I hope to witness will be the retention of someone on a full-time basis to take over the handling of public relations, under the Chairman of the Standing Committee, doing the details that Thomas L. Sidlo has had to carry on during the present year, and freeing him for direction and planning.

The House of Delegates and Board of Governors will be on the lookout to guard against the pitfall of the central staff's taking over the highly important tasks and prerogatives now exercised by the volunteer officers—the President, Chairman of the House, Secretary and Treasurer. The real future of the Association is dependent upon the leadership remaining in the hands of these men, directly under the control of the House and the Board.

Group Membership

In the over-all view of the country gained by your President during his travels, he is impressed by the strength of the integrated Bar in every state adopting that form of organization. Among the many advantages of integration is the fact that it brings into the ranks of the organized Bar the member of the profession who is on the fringe, forced there by economic pressure, traits of character, or otherwise. That man does not belong to the local bar association, he is not a member of the American Bar Association, and in a voluntary state his name does not appear on the roster of the state bar association, but in the integrated Bar he is necessarily a member of the state Bar, paying dues and subject to disciplinary procedures.

The impression gained from talking with a large number of members of the legal profession in all sections of the United States is that sooner or later the Bar will adopt the so-called unit-membership plan. In a recent address delivered to the Tennessee Bar Association, Glenn R. Winters, Secretary and Treasurer of the American Judicature Society and Editor of its *Journal*, stated "In my opinion a part of the destiny of the organized bar of this country is a complete system combining integration and federation so that every lawyer admitted to practice will be a member of his state bar and ipso facto a member of the American Bar Association." A similar view has been expressed to me by Reginald Heber Smith, Director of the Survey of the Legal Profession.

In a thoughtful letter to Richard P. Tinkham, President of the Conference of Bar Association Presidents, a plan was submitted by Ben C. Boer, President of the Ohio State Bar Association, embodying, as one of its ultimate results, "a great expansion of membership, if, as should be the case, every member of an affiliated State Association paid dues into the American Bar Association,—all of which the affiliated associations should of course collect for the American Bar Association".

Our traditional attitude has been one of selective membership, and a large number of the leaders in the work of the Association adhere to that view at the present time, as against any plan for unit-membership. I predict that in the long run it will be realized that the selection should take place before the candidate begins his legal studies and when he is admitted to the practice.

Numerical and perhaps actual strength of other professional organizations such as the American Medical Association and the American Dental Association is much greater than is that of the American Bar Association. While other elements may enter into the situation, I believe that one of the principal reasons for the greater influence of these other organizations is that their membership includes approximately 80 per cent of the practitioners in their respective fields, whereas with us it is only 25 per cent. I am firmly of the belief that this is something which must receive the attention of the American Bar Association. If the issue is not raised by those of us who are in positions of responsibility, it will come by demand of the membershp itself. I have brought the question before our Committee on Scope and Correlation of Work, also the Administration Committee of the Board of Governors. Knowing the traditional opposition within our own ranks to any change along these lines, I am not surprised, disappointed or discouraged by the cool reception my efforts have received. It is a question which must be kept very much alive, and I say to you here and now that the time will come, perhaps in the not too distant future, when the fundamentals of our membership structure will change, either along the lines pursued by the other professions or otherwise.

Something may be lost in surrendering our policy of selectivity. The fact remains, however, that our organization is primarily professional rather than social. If a lawyer is fit to engage in the practice of the law he is worthy of membership in the organized Bar. If his conduct is not what it should be we can take care of him more effectively from within than from without. This is the only major objection that has been raised. I submit to you that it is capable of

solution. With 80 per cent of the members of the legal profession on the membership roster of the American Bar Association, not only will our financial resources be infinitely stronger than at the present time, but the Association will be in the position of speaking with definite authority for an outstanding majority of the members of the profession whereas today we speak for 25 per cent.

I have found that lawyers all over the country are thinking and talking about this proposition. The Bar demands that something be done about it, and I transmit this message to the members of the Board of Governors and House of Delegates.

It is of course said that this cannot be done. But in the Sikorsky plant there is a sign quoted by the *Reader's Digest* which reads:

> According to recognized aerotechnical tests, the bumblebee cannot fly because of the shape and weight of his body in relation to the total wing area. The bumblebee doesn't know this, so he goes ahead and flies anyway.

Conclusion

For reasons stated at the outset, this address has not followed the orthodox manner, but it has afforded an opportunity to say to you, rather informally, some of the things that are very much on my mind, relative to the Association itself. A person's most valuable and lasting contribution is based on something he really knows, from personal experience; and right now, at the end of this year, the subject I should know best is the American Bar Association.

In closing, let me repeat that the estimate placed upon the legal profession and the organized Bar by the American public is for the determination of the lawyer himself. A great responsibility is his, far greater than he has yet come to realize. Jan Masaryk, the patriot-martyr of Czechoslovakia, in one of his last utterances in this country, during a World Forum conducted by *Time* and *Life* in Cleveland several years ago, said: "You lawyers of America, and your unfettered judges and courts, and your consecration to the task of upholding the rule of law as opposed to the rule of man, are the one great hope of mankind."

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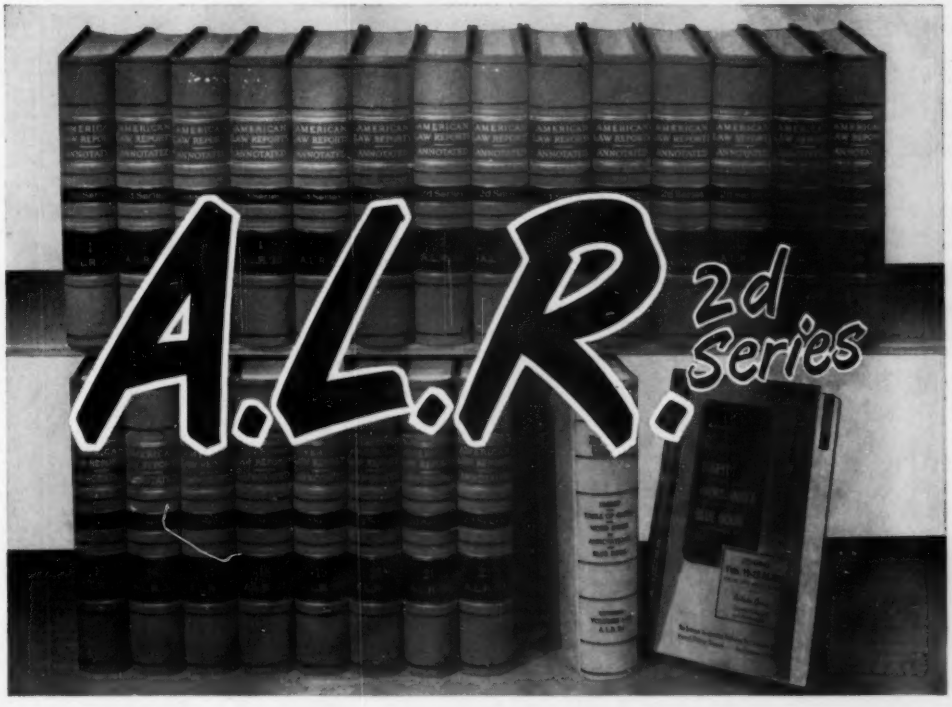

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